SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1966

No. 181 12

ANTHONY M. GROSSO, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED MAY 28, 1966
CERTIORARI GRANTED OCTOBER 10, 1966

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 181

ANTHONY M. GROSSO, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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[fol. A]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,810

UNITED STATES OF AMERICA,

vs.

ANTHONY M. GROSSO, SAMUEL J. GROSSO, JENNIE B. GROSSO, JOSEPH PINO.

Appeal of Anthony M. Grosso

Appeal from the Judgment and Order of the United States District Court for the Western District of Pennsylvania at Criminal No. 62-281.

Appendix for Appellant—Filed September 10, 1964

[fol. 1a]

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DOCKET ENTRIES

Doc. No.	*Date*	*Docket Entries*
	1962	
	• • • • • • •	
1	Sept. 26	Indictment filed.
	• • • • • • •	
9	Nov. 15	Hearing on Oral Motion to defer plea of Anthony Grosso begun and concluded before Rosenberg, J. (Rep. E. Pock) (Motion granted and written order to be entered.)

Doc. No.	Date	Docket Entries
	1962	
9	Nov. 15	The above named defts. Samuel J. Grosso, Jennie B. Grosso and Joseph Pino, being arraigned, all plead NOT GUILTY in open court before Rosenberg, J. (Rep. E. Pock.)
10	Dec. 13	Motion to dismiss indictment filed by deft. Anthony M. Grosso.
	Dec. 14	Deft. Anthony M. Grosso arraigned in open court before Sorg, J. pleads NOT GUILTY, Rep. W. Dalton.
	• • • • • • •	
	1963	
18	Feb. 18	Motion to dismiss indictment filed by defts.
19	Feb. 18	Motion for suppression of evidence filed by defts.
	• • • • • • •	
21	Feb. 20	Order entered directing that the motion to dismiss the indictment is fixed for hearing [fol. 2a] on 3-20-63 at 10:00 A. M., and counsel for the parties are directed to file their briefs on or before 3-15-63 at 10:00 A. M. If counsel for any of the parties fail to comply with this Order, appropriate sanctions and penalties will be imposed (Gourley, J.)
22	Feb. 20	Order entered directing that the motion for suppression of evidence is fixed for hearing on 3-20-63 at 10:00 A. M., and counsel for the parties are directed to submit their briefs in support of this motion on or before 3-15-63 at 10:00 A. M. It is further ordered that counsel for the Gov't. have certain information available as stated more fully in this Order. (Gourley, J.)

Doc. No.	*Date*	*Docket Entries*
	1963	
23	Feb. 20	Memorandum Order entered directing that the motion for bill of particulars is fixed for hearing on 3-20-63 at 10:00 A. M. Counsel are directed to submit to the Court their briefs on or before 3-15-63 at 10:00 A. M. (Gourley, J.)
24	Mar. 15	Hearing on Motion to Suppress Evidence begun and concluded C. A. V. before Gourley, J. Hearing memo filed. (Rep. R. Palmer.)
25	Mar. 18	Order entered directing that arguments on deft's Motion to Dismiss Indictment, Mo- [fol. 3a] tion for Bill of Particulars Ancillary to Motion to Suppress, and hearings on defts' Motion for Suppression of Evidence previously scheduled for March 20, 1963 are continued until further Order of Court. (Gourley, J.)
26	Apr. 17	Transcript filed *re:* Hearing date on deft's motions to suppress evidence held at Pgh. 3/15/63 before Gourley, J. (Rep. R. Palmer.)
27	Apr. 25	Hearing on Motion to set a date for Hearing on Motion to Suppress begun and concluded before Gourley, J. Memo filed. (Rep. R. Palmer) (Counsel to present petition to court.)
28	May 10	Transcript filed *re:* Further hearing *re* time for hearing on deft's motions to suppress evidence held at Pgh. 4/25/63, before Gourley, J. (Rep. R. Palmer.)
29	June 25	Order ent. directing that Motion for Bill of Particulars, Motion to Dismiss indictment and Motion for Suppression of Evidence is

Doc. No.	Date	Docket Entries
	1963	
		fixed for hearing & argument on 9/23/63 at 10 A. M. and further that on that date counsel are to be prepared to offer evidence, oral or documentary in support of their respective positions and finally ordering that if counsel desire to file supplementary or reply [fol. 4a] briefs, they shall do so on or before 9/16/63. (Gourley, J.)
30	Sept. 16	Motion for leave to amend Deft's Motion to the Suppression of Evidence filed by defts.
31	Sept. 17	Order entered directing that the hearing & argument on deft's Motion for the Suppression of Evidence is fixed for 9-23-63 at 10:00 A. M., the date and time fixed for hearing and argument on deft's other motions previously filed. (Gourley, J.)
	Sept. 23	Hearing on Motion for Suppression of Evidence, Motion for Bill of Particulars & Motion to dismiss begun before Gourley, J. (Rep. J. Lilienthal.)
	Sept. 24	Hearing continues.
	Sept. 25	Hearing continues.
	Sept. 26	Hearing continues.
32	Sept. 26	Order entered directing that the hearing on the divers motions is continued to 10:00 A. M. on 9-30-63. (Gourley, J.)
33	Sept. 30	Hearing continued and concluded C. A. V. Hearing memo filed. (Rep. J. LaMotte—9-30-63.)
34	Sept. 30	Order entered directing defts. to file brief within 10 days after filing of the entire transcript and giving the government 5 days to

Doc. No.	*Date*	*Docket Entries*
	1963	
		file brief after filing of the defts' brief. (Gourley, J.)
[fol. 5a]		
35	Sept. 30	Stipulation *re* defts' Motion for Suppression of Evidence filed by counsel with Order thereon approving same. (Gourley, J.)
36	Sept. 30	Order entered denying Motion for Suppression of Evidence in regards to the items of evidence enumerated in Para. 1, 10, 15, 20, 21, 23. (Gourley, J.)
41	Oct. 1	Order entered directing that the defts. Motion for Bill of Particulars Ancillary to Motion to Suppress hereby is denied. (Gourley, J.)
38	Sept. 30	Praecipe by Thomas A. Wadden as counsel for Joseph Pino and Jennie Grosso (R. Weinberg).
39	Sept. 30	Praecipe by Vincent Fuller as counsel for Samuel Grosso.
40	Sept. 30	Praecipe by James McLaughlin for Anthony Grosso.
42	Oct. 2	Order entered directing that the defts. motion for leave to amend defts. Motion for the Suppression of Evidence is granted. (Gourley, J.)
	1964	
47	Jan. 9	Opinion filed and Order entered directing that defts. Motion for Suppression of Evi-

Doc. No.	Date	Docket Entries
	1964	
		[fol. 6a] dence described in paragraphs 3 and 25 of said Motion is hereby denied and the within proceedings is fixed for trial to commence 2-3-64, and no continuances will be granted; Opinion on Motion to Dismiss Indictment filed and Order entered directing that deft's Motion to Dismiss Indictment is hereby denied. (Gourley, J.)
49	Feb. 3	Motion for Severance by defts. Samuel J. Grosso, Jennie B. Grosso and Joseph Pino.
51	Feb. 4	Order dated 2/3/64 entered granting Motion for Severance; further Ordered that oral motion of U. S. A. for trial of deft. Anthony M. Grosso precede the trial of defts. Samuel Grosso, Jennie Grosso and Joseph Pino is granted and that trial commence on 2/3/64. (Foley, J.)
52	Feb. 3	Order ent. directing that this case Cr 62-281 be assigned to Hon. Roger T. Foley, for trial and final determination. (Gourley, J.)
	Feb. 3	Jury trial as to deft. Anthony M. Grosso begun before Foley, J.. and a jury.
	Feb. 4	Jury trial continues.
[fol. 7a]		
54	Feb.. 17	Hearing begun on deft's oral motion for Judgment of Acquittal before Foley, J.
55	Feb. 18	Motion for Judgment of Acquittal at close of Government's evidence filed by deft.
	Feb. 18	Hearing continues and concludes on deft's. Motion for Judgment of Acquittal before

Doc. No.	Date	Docket Entries
	1964	
		Foley, J. Hearing memo filed. (Reps. J. Lilienthal and J. LaMotte) (Denied as to Cts. 1, 2, 3 thru 15, 16 and 17; Ct. 18 to be dismissed against Anthony Grosso; Ct. 19 withdrawn; decision reserved by Court on Cts. 20, 21, 22 and 23.)
		* * * * * * *
56	Feb. 24	Petition filed and Order entered directing that a Writ of *Habeas Corpus Ad Testificandum* be issued for Harry Levine, Eugene Hurte and Robert Maloney. (Miller, J.)
	Feb. 24	Writ of *Habeas Corpus Ad Testificandum* issued.
	Feb. 25	Jury trial continues.
	Feb. 26	Jury trial continues.
	Feb. 27	Jury trial continues.
	Feb. 28	Jury trial continues.
	Feb. 28	Following motions made orally in Court and denied orally; Motion for Judgment of Acquittal, Motion to Renew all motions here- [fol. 8a] tofore ruled on and to dismiss Cts. 20, 21, 22 and 23. (Foley, J.)
	Mar. 2	Hearing on Deft's motion for a mistrial held and denied orally. (Foley, J.)
		* * * * * * *
58	Mar. 4	Requests for Instructions filed by deft. with refusal of 1, 2, 3, 5, 7, 9, 10, 11, 12 and 14. (Foley, J.)
59	Mar. 4	Order *re* jury accommodations, etc. filed. (Foley, J.) CC issued.
60	Mar. 5	Writ of *Hab. Corp. ad Testif.*, on Harry Levine, Eugene Hurte and Robt. Maloney returned executed on 2/24/64.

Doc. No.	*Date*		*Docket Entries*
	1964		
	Mar.	5	(Jurors deliberating.)
	Mar.	6	(Jurors deliberating.)
61	Mar.	7	Jury deliberates and returns a verdict (8:30 P. M.) find the deft. Anthony M. Grosso guilty on Cts. 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 20, 21, 22, and 23, and Not Guilty as to Ct. 5. Verdict sheet filed.
	Mar.	9	Bail orally denied in Open Court. (Foley, J.)
62	Mar.	9	Instructions to the Jury filed by the Court. (Foley, J.)
63	Mar.	10	The sentence of the Court, imposed 3/9/64, is that the deft. Anthony M. Grosso be imprisoned for one year and pay fine of $1,000.00; that he be further imprisoned until [fol. 9a] payment of fine as to Ct. 1. Ct. 2: One year and pay fine of $10,000.00 together with costs; stay imprisoned until payment of fine. Imprisonment to run consecutively with sentence imposed at Ct. 1. Ct. 3: One year imprisonment and pay fine of $10,000.00 and costs; stay imprisoned until payment of fine. Imprisonment to run consecutive with sentence imposed at Ct. 2. Ct. 4: One year imprisonment and pay fine of $10,000.00 and costs; stay imprisoned until payment of fine. Imprisonment to run concurrently with sentence imposed at Ct. 2. Ct. 6: One year imprisonment and pay fine of $10,000.00 with costs; stay imprisoned until payment of fine. Imprisonment to run concurrently with sentence imposed at Ct. 2. Ct. 7: One year and pay fine of $10,000.00 and costs; stay im-

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prisoned until payment of fine. Imprisonment to run consecutively with sentence imposed at Ct. 3. Ct. 8: One year and pay fine of $10,000.00 and costs; stay imprisoned until payment of fine. Imprisonment to run concurrently with sentence imposed at Ct. 2. Ct. 9: One year and pay fine of $10,000.00 and costs; stay imprisoned until payment of fine. Imprisonment to run concurrently with [fol. 10a] imprisonment imposed at Ct. 2. Ct. 10: One year and pay $10,000.00 fine and costs; stay imprisoned until paid. Imprisonment to run concurrently with sentence imposed at Ct. 2. Ct. 11: One year and pay $10,000.00 and costs; stay imprisoned until fine is paid. Imprisonment to run concurrently with sentence imposed at Ct. 2. Ct. 12: One year and pay fine of $10,000.00 and costs; stay imprisoned until paid. Imprisonment to run concurrently with sentence imposed at Ct. 2. Ct. 13: One year and pay fine of $10,000.00 and costs; stay imprisoned until paid. Imprisonment to run concurrently with sentence imposed at Ct. 2. Ct. 14: One year and pay fine of $10,000.00 and costs; stay imprisoned until fine is paid. Imprisonment to run consecutively with sentence imposed at Ct. 7. Ct. 15: One year and pay fine of $10,000.00 and costs; stay imprisoned until paid. Imprisonment to run concurrently with sentence imposed at Ct. 2. Ct. 16: One year and pay $10,000.00 and costs; stay imprisoned until fine is paid. Imprisonment to run concurrently with sen-

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		tence imposed at Ct. 2. Ct. 17: One year and $10,000.00 fine and costs; stay impris- [fol. 11a] oned until paid. Imprisonment to run concurrently with sentence imposed Ct. 2. Ct. 20: One year, pay fine of $10,000.00 and costs; stay imprisoned until paid. Imprisonment to run consecutively with sentence imposed at Ct. 14. Ct. 21: One year, pay fine of $10,000.00 and costs; stay imprisoned until paid. Imprisonment to run consecutively with sentence imposed at Ct. 20. Ct. 22: One year, pay $10,000.00 fine and costs; stay imprisoned until paid. Imp. to run consecutively with sent. imposed at Ct. 21. Ct. 23; One year, pay fine of $10,000.00 and costs; stay imprisoned until paid. Imp. to run consecutively with sentence imposed at Ct. 22. Total imprisonment is nine (9) years and the total fine is $191,000.00 (Foley, J.).
64	Mar. 10	Motion for Judgment of acquittal after verdict filed by deft. A. Grosso.
65	Mar. 10	Motion for New Trial filed by deft. A. Grosso.
66	Mar. 10	Affidavit of Fred C. Koerner, Jr. filed by deft. A. Grosso.
67	Mar. 10	Hearing on Motion for Judgment of Acquittal held before Foley, J. and concluded. Hearing memo filed. (Motion denied orally [fol.12a] in all respects.) (Rep. B. Cook.)
68	Mar. 10	Hearing on Motion for New Trial held before Foley, J. and concluded, Hearing denied

Doc. No.	Date	Docket Entries
	1964	
		orally in all respects—request by deft's counsel for written order denying bail refused—Order contained in the record.
69	Mar. 10	Notice of Appeal filed by deft. Anthony M. Grosso.
	Mar. 10	Copy of Notice mailed U. S. Court of Appeals together with copy of docket entries.
	Mar. 11	Copy of Notice mailed U. S. Attorney; letters to deft's counsel and Judges Foley and Gourley.
70	Mar. 11	Order entered directing U. S. Marshal to pay medical bill to Dr. Stoffan for services rendered to two ill jurors during deliberation. (Foley, J.) (C. C. Issued.)
71	Mar. 11	Order ent. directing that supporting affidavit referred to in Motion for New Trial on Mar. 10 be made part of the record on that motion. The submission of the affidavit does not alter the decision of the Court that the Motion for New Trial should be and is denied in all respects. (Foley, J.)
	Mar. 11	Deft. Samuel J. Grosso withdrew plea of Not Guilty ent. 11/15/62 and ent. plea of [fol. 13a] GUILTY to Ct. 1 before Foley, J. (Rep. B. Cook.)
	Mar. 11	Deft. Jennie B. Grosso withdrew plea of Not Guilty ent. 11/15/62 and ent. plea of GUILTY to Ct. 26 before Foley, J. (Rep. B. Cook.)
	Mar. 11	Deft. Joseph A. Pino withdrew plea of Not Guilty ent. 11/15/62 and ent. plea of GUILTY to Ct. 1 before Foley, J. (Rep. B. Cook.)

IN UNITED STATES DISTRICT COURT

INDICTMENT—Filed September 26, 1962

The Grand Jury charges:

That on or about the 29th day of April, 1958, the exact date being to the Grand Jury unknown, up to and including April 10, 1961, in the Western District of Pennsylvania, Anthony M. Grosso, Samuel J. Grosso, Jennie B. Grosso and Joseph Pino, hereinafter referred to as the defendants, and Harold Hannon, Thomas LaMantia, Richard Albert, Fred Albert, Wilbert Patterson, Emma Patterson, Albert Sunner, Regal Pace, Mary Jenny Pace, Joseph Fazio, James Giles, James Savena, Ann Crosby, Anthony Pometto, Bernard Riccardi, Harry Chapman and George Nicholas, co-conspirators but not defendants herein, and divers other persons whose names are to the Grand [fol. 14a] Jury unknown, did unlawfully, wilfully and knowingly combine, conspire, confederate and agree together with each other to defraud the United States of America by impairing, obstructing and defeating the lawful governmental functions of the Internal Revenue Service of the Treasury Department of the United States in the ascertainment, computation, assessment and collection of revenue, to wit: wagering taxes imposed (1) by Section 4401 of Title 26, United States Code, tax on wagering and (2) by Section 4411 of Title 26, United States Code, tax on each person who is liable for tax under Section 4401 of Title 26, United States Code, and who is engaged in receiving wagers for and on behalf of any person or persons so liable.

The Grand Jury further charges that said unlawful combination, conspiracy, confederation and agreement was to be accomplished by means and methods and in the manner following:

1. That during the period of times heretofore mentioned, at the Western District of Pennsylvania, the defendants, Anthony M. Grosso, Samuel J. Grosso, Jennie B. Grosso and Joseph Pino were engaged in the business

of accepting wagers and were required by law to report and pay taxes upon such wagers, so accepted by them, in the manner provided by law.

2. It was a part of the conspiracy that the defendants and co-conspirators would conceal and disguise the nature and extent of their wagering operation and the identity of those who were engaged therein.

3. It was a part of said conspiracy that inaccurate and incomplete records would be kept by the defendants in [fol. 15a] order to conceal from the Treasury Department and the Internal Revenue Service a true and accurate amount of taxable wagers placed with the said defendants.

4. It was a part of the said conspiracy that certain of the defendants and co-conspirators in order to cover up and conceal the location and the true scope of the gambling operation conducted, would engage in the business of accepting wagers without first having paid the special occupational tax imposed by Section 4411 of Title 26, United States Code, required to be paid as a condition precedent to carrying on the said business, and without having registered with the District Director of Internal Revenue, as required by Section 4412, Title 26, United States Code.

5. It was part of the said conspiracy that the defendants would cause to be made and subscribed false statements and returns to wit: Tax on Wagering, Form 730, and other returns and statements which contained written declarations that it is made under penalties of perjury, which the defendants did not believe to be true as to every material matter.

6. It is further part of said conspiracy that the defendants herein would neglect and fail to pay a substantial portion of the taxes due and payable to the United States upon all of the aforesaid wagers and the defendants herein would attempt to evade and defeat the payment to the United States by the said defendants of the aforesaid taxes in the manner and by the means aforesaid.

Overt Acts

The Grand Jury further charges that said conspirators, in furtherance of and for the purpose of carrying into execution said combination, conspiracy, confederation and [fol. 16a] agreement, did in the Western District of Pennsylvania, do and perform the following and other overt acts, to wit:

1. On February 19, 1959, Samuel J. Grosso, Jennie Gatta (now Jennie B. Grosso) and Joseph Pino met with Lillian Albert, Mary Jenny Pace, alias Mary Robinson, Gen Antanasio, Charles Cheetham, Joseph C. Grosso, Jr., Gerald Grosso at the residence of Edmund and Ruth Lovejoy in Jefferson Borough, Allegheny County, Pennsylvania for the purpose of tabulating numbers lottery wagers.

2. On April 20, 1959, Samuel J. Grosso met with Anthony Buono, Gen Antanasio, Joseph C. Grosso, Jr. and Jake Sandman in a car in the Oakland District of Pittsburgh with records of accounts relating to the numbers lottery business.

3. On March 25, 1961, Jennie B. Grosso met with Gloria Krug, Gen Antanasio, William Schaefer and Tony Capogreca at the residence of William and Alice Betz in Bethel Park, Allegheny County, Pennsylvania, for the purpose of tabulating numbers lottery wagers.

4. On or about March 30, 1959, Joseph Pino subscribed to and filed and caused to be filed with the District Director of Internal Revenue in Pittsburgh, Pennsylvania, a Form 730, Tax on Wagering, for the month of February 1959 accompanied by a letter in which Joseph Pino accepted full responsibility for the excise taxes due and owing the government and stated that the numbers lottery began on February 12, 1959 and ended on February 19, 1959.

5. Samuel J. Grosso filed or caused to be filed with the District Director of Internal Revenue, Pittsburgh, Pennsylvania, Form 730, Tax on Wagering for the month of

[fol. 17a] March 1960 wherein he stated "No Action" and reported no gross wagers accepted and reported no tax due.

6. On December 14, 1959, Joseph Pino subscribed to and filed and caused to be filed with the District Director of Internal Revenue, Pittsburgh, Pennsylvania, Forms 730, Tax on Wagering for the months June, July and August 1959, wherein it is stated the word "None", indicating no gross wagers were accepted and no tax due on each respective return.

7. On December 16, 1959, Samuel J. Grosso subscribed to and filed and caused to be filed with the District Director of Internal Revenue, Pittsburgh, Pennsylvania, Form 11-C, Special Return and Application for Registry—Wagering and failed to state the number of employees or agents engaged in receiving wagers on his behalf and failed to state the true name, address and special stamp number of such persons.

In violation of Title 18, United States Code, Section 371.

Second Count

The Grand Jury further charges:

That on or about May 31, 1958 in the Western District of Pennsylvania, Anthony M. Grosso, Samuel J. Grosso and Joseph Pino, defendants herein, who during the month of April, 1958, were engaged in the business of accepting wagers as a partnership, as defined by Section 7701 (2) of Title 26, United States Code, did wilfully fail to pay the tax on wagers imposed by Section 4401 of Title 26, United States Code, due and owing the United States of America by the said defendants for the month of April 1958 in the amount of $1,039.03, in violation of Section 7203 of Title 26 United States Code.

[fol. 18a]

Third Count

The Grand Jury further charges:

That on or about July 31, 1958, in the Western District of Pennsylvania, Anthony M. Grosso, Samuel J. Grosso and Joseph Pino, defendants herein, who during the month of June, 1958, were engaged in the business of accepting wagers as a partnership, as defined by Section 7701 (2) of Title 26, United States Code, did wilfully fail to pay the tax on wagers imposed by Section 4401 of Title 26, United States Code, due and owing the United States of America by the said defendants for the month of June, 1958, in the amount of $4,153.41, in violation of Section 7203 of Title 26 United States Code.

Fourth Count

The Grand Jury further charges:

That on or about February 28, 1959, in the Western District of Pennsylvania, Anthony M. Grosso, Samuel J. Grosso and Joseph Pino, defendants herein, who during the month of January, 1959, were engaged in the business of accepting wagers as a partnership, as defined by Section 7701 (2) of Title 26, United States Code, did wilfully fail to pay the tax on wagers imposed by Section 4401 of Title 26, United States Code, due and owing the United States of America by the said defendants for the month of January, 1959 in the amount of $1,551.86, in violation of Section 7203 of Title 26 United States Code.

Fifth Count

The Grand Jury further charges:

That on or about March 31, 1959, in the Western District of Pennsylvania, Anthony M. Grosso, Samuel J. [fol. 19a] Grosso and Joseph Pino, defendants herein, who during the month of February, 1959, were engaged in the

business of accepting wagers as a partnership, as defined by Section 7701 (2) of Title 26, United States Code, did wilfully fail to pay the tax on wagers imposed by Section 4401 of Title 26, United States Code, due and owing the United States of America by the said defendants for the month of February, 1959 in the amount of $1,226.51, in violation of Section 7203 of Title 26 United States Code.

Sixth Count

The Grand Jury further charges:

That on or about April 30, 1959, in the Western District of Pennsylvania, Anthony M. Grosso, Samuel J. Grosso and Joseph Pino, defendants herein, who during the month of March, 1959, were engaged in the business of accepting wagers as a partnership, as defined by Section 7701 (2) of Title 26, United States Code, did wilfully fail to pay the tax on wagers imposed by Section 4401 of Title 26, United States Code, due and owing the United States of America by the said defendants for the month of March, 1959, in the amount of $2,258.62, in violation of Section 7203 of Title 26 United States Code.

Seventh Count

The Grand Jury further charges:

That on or about May 31, 1959, in the Western District of Pennsylvania, Anthony M. Grosso, Samuel J. Grosso and Joseph Pino, defendants herein, who during the month of April, 1959, were engaged in the business of accepting wagers as a partnership, as defined by Section 7701 (2) of Title 26, United States Code, did wilfully fail to pay [fol. 20a] the tax on wagers imposed by Section 4401 of Title 26, United States Code, due and owing the United States of America by the said defendants for the month of April, 1959, in the amount of $17,011.88, in violation of Section 7203 of Title 26 United States Code.

Eighth Count

The Grand Jury further charges:

That on or about June 30, 1959, in the Western District of Pennsylvania, Anthony M. Grosso, Samuel J. Grosso and Joseph Pino, defendants herein, who during the month of May, 1959, were engaged in the business of accepting wagers as a partnership, as defined by Section 7701 (2) of Title 26, United States Code, did wilfully fail to pay the tax on wagers imposed by Section 4401 of Title 26, United States Code, due and owing the United States of America by the said defendants for the month of May, 1959, in the amount of $1,883.09, in violation of Section 7203 of Title 26 United States Code.

Ninth Count

The Grand Jury further charges:

That on or about July 31, 1959 in the Western District of Pennsylvania, Anthony M. Grosso, Samuel J. Grosso and Joseph Pino, defendants herein, who during the month of June, 1959, were engaged in the business of accepting wagers as a partnership, as defined by Section 7701 (2) of Title 26, United States Code, did wilfully fail to pay the tax on wagers imposed by Section 4401 of Title 26, United States Code, due and owing the United States of America by the said defendants for the month of June, 1959 in the amount of $1,594.47, in violation of Section 7203 of Title 26 United States Code.

[fol. 21a]

Tenth Count

The Grand Jury further charges:

That on or about August 31, 1959, in the Western District of Pennsylvania, Anthony M. Grosso, Samuel J. Grosso and Joseph Pino, defendants herein, who during the month of July, 1959, were engaged in the business of accepting wagers as a partnership, as defined by Section 7701 (2)

of Title 26, United States Code, did wilfully fail to pay the tax on wagers imposed by Section 4401 of Title 26, United States Code, due and owing the United States of America by the said defendants for the month of July, 1959, in the amount of $1,903.68, in violation of Section 7203 of Title 26 United States Code.

Eleventh Count

The Grand Jury further charges:

That on or about September 30, 1959, in the Western District of Pennsylvania, Anthony M. Grosso, Samuel J. Grosso and Joseph Pino, defendants herein, who during the month of August, 1959, were engaged in the business of accepting wagers as a partnership, as defined by Section 7701 (2) of Title 26, United States Code, did wilfully fail to pay the tax on wagers imposed by Section 4401 of Title 26, United States Code, due and owing the United States of America by the said defendants for the month of August, 1959, in the amount of $1,597.45, in violation of Section 7203 of Title 26 United States Code.

Twelfth Count

The Grand Jury further charges:

That on or about October 31, 1959, in the Western District of Pennsylvania, Anthony M. Grosso, Samuel J. [fol. 22a] Grosso and Joseph Pino, defendants herein, who during the month of September, 1959, were engaged in the business of accepting wagers as a partnership, as defined by Section 7701 (2) of Title 26, United States Code, did wilfully fail to pay the tax on wagers imposed by Section 4401 of Title 26, United States Code, due and owing the United States of America by the said defendants for the month of September, 1959, in the amount of $1,513.45, in violation of Section 7203 of Title 26 United States Code.

Thirteenth Count

The Grand Jury further charges:

That on or about November 30, 1959, in the Western District of Pennsylvania, Anthony M. Grosso, Samuel J. Grosso and Joseph Pino, defendants herein, who during the month of October, 1959, were engaged in the business of accepting wagers as a partnership, as defined by Section 7701 (2) of Title 26, United States Code, did wilfully fail to pay the tax on wagers imposed by Section 4401 of Title 26, United States Code, due and owing the United States of America by the said defendants for the month of October, 1959, in the amount of $1,658.48, in violation of Section 7203 of Title 26 United States Code.

Fourteenth Count

The Grand Jury further charges:

That on or about December 31, 1959 in the Western District of Pennsylvania, Anthony M. Grosso, Samuel J. Grosso and Joseph Pino, defendants herein, who during the month of November, 1959, were engaged in the business of accepting wagers as a partnership, as defined by Section 7701 (2) of Title 26, United States Code, did wilfully fail [fol. 23a] to pay the tax on wagers imposed by Section 4401 of Title 26, United States Code, due and owing the United States of America by the said defendants for the month of November, 1959, in the amount of $4,165.43, in violation of Section 7203 of Title 26 United States Code.

Fifteenth Count

The Grand Jury further charges:

That on or about January 31, 1960 in the Western District of Pennsylvania, Anthony M. Grosso, Samuel J. Grosso and Joseph Pino, defendants herein, who during the month of December, 1959, were engaged in the business of accepting wagers as a partnership, as defined by Section

7701 (2) of Title 26, United States Code, did wilfully fail to pay the tax on wagers imposed by Section 4401 of Title 26, United States Code, due and owing the United States of America by the said defendants for the month of December, 1959, in the amount of $1,795.39, in violation of Section 7203 of Title 26 United States Code.

Sixteenth Count

The Grand Jury further charges:

That on or about April 30, 1960 in the Western District of Pennsylvania, Anthony M. Grosso, Samuel J. Grosso and Joseph Pino, defendants herein, who during the month of March, 1960, were engaged in the business of accepting wagers as a partnership, as defined by Section 7701 (2) of Title 26, United States Code, did wilfully fail to pay the tax on wagers imposed by Section 4401 of Title 26, United States Code, due and owing the United States of America by the said defendants for the month of March, 1960, in the amount of $450.00, in violation of Section 7203 of Title 26 United States Code.

[fol. 24a] Seventeenth Count

The Grand Jury further charges:

That on or about May 31, 1960 in the Western District of Pennsylvania, Anthony M. Grosso, Samuel J. Grosso and Joseph Pino, defendants herein, who during the month of April, 1960, were engaged in the business of accepting wagers as a partnership, as defined by Section 7701 (2) of Title 26, United States Code, did wilfully fail to pay the tax on wagers imposed by Section 4401 of Title 26, United States Code, due and owing the United States of America by the said defendants for the month of April, 1960, in the amount of $93.55, in violation of Section 7203 of Title 26 United States Code.

Eighteenth Count

The Grand Jury further charges:

That on or about April 30, 1961, in the Western District of Pennsylvania, Anthony M. Grosso and Jennie B. Grosso, defendants herein, who during the month of March, 1961, were engaged in the business of accepting wagers as a partnership, as defined by Section 7701 (2) of Title 26, United States Code, did wilfully fail to pay the tax on wagers imposed by Section 4401 of Title 26, United States Code, due and owing the United States of America by the said defendants for the month of March, 1961, in the amount of $24,252.75, in violation of Section 7203 of Title 26, United States Code.

Nineteenth Count

The Grand Jury further charges:

That on or about May 31, 1961, in the Western District of Pennsylvania, Anthony M. Grosso and Jennie B. Grosso, [fol. 25a] defendants herein, who during the month of April, 1961, were engaged in the business of accepting wagers as a partnership, as defined by Section 7701 (2) of Title 26, United States Code, did wilfully fail to pay the tax on wagers imposed by Section 4401 of Title 26, United States Code, due and owing the United States of America by the said defendants for the month of April, 1961, in the amount of $516.72, in violation of Section 7203 of Title 26 United States Code.

Twentieth Count

The Grand Jury further charges:

That on or about April 29, 1958, at Pittsburgh, in the County of Allegheny, in the Western District of Pennsylvania, the defendant Anthony M. Grosso, being a person engaged in the business of accepting wagers and in receiving wagers for or on behalf of another person or persons engaged in the business of accepting wagers, and as

such being required to pay the special tax imposed by Section 4411 of Title 26, United States Code, did wilfully fail to pay said tax as required by said section; contrary to the provisions of Section 7203 of Title 26, United States Code.

Twenty-First Count

The Grand Jury further charges:

That on or about January 1, 1959, at Pittsburgh, in the County of Allegheny, in the Western District of Pennsylvania, the defendant Anthony M. Grosso being a person engaged in the business of accepting wagers and in receiving wagers for or on behalf of another person or persons engaged in the business of accepting wagers, and as [fol. 26a] such being required to pay the special tax imposed by Section 4411 of Title 26, United States Code, did wilfully fail to pay said tax as required by said section; contrary to the provisions of Section 7203 of Title 26, United States Code.

Twenty-Second Count

The Grand Jury further charges:

That on or about July 1, 1959 at Pittsburgh, in the County of Allegheny, in the Western District of Pennsylvania, the defendant Anthony M. Grosso being a person engaged in the business of accepting wagers and in receiving wagers for or on behalf of another person or persons engaged in the business of accepting wagers, and as such being required to pay the special tax imposed by Section 4411 of Title 26, United States Code, did wilfully fail to pay said tax as required by said section; contrary to the provisions of Section 7203 of Title 26, United States Code.

Twenty-Third Count

The Grand Jury further charges:

That on or about March 13, 1961, at Pittsburgh, in the County of Allegheny, in the Western District of Pennsyl-

Eighteenth Count

The Grand Jury further charges:

That on or about April 30, 1961, in the Western District of Pennsylvania, Anthony M. Grosso and Jennie B. Grosso, defendants herein, who during the month of March, 1961, were engaged in the business of accepting wagers as a partnership, as defined by Section 7701 (2) of Title 26, United States Code, did wilfully fail to pay the tax on wagers imposed by Section 4401 of Title 26, United States Code, due and owing the United States of America by the said defendants for the month of March, 1961, in the amount of $24,252.75, in violation of Section 7203 of Title 26, United States Code.

Nineteenth Count

The Grand Jury further charges:

That on or about May 31, 1961, in the Western District of Pennsylvania, Anthony M. Grosso and Jennie B. Grosso, [fol. 25a] defendants herein, who during the month of April, 1961, were engaged in the business of accepting wagers as a partnership, as defined by Section 7701 (2) of Title 26, United States Code, did wilfully fail to pay the tax on wagers imposed by Section 4401 of Title 26, United States Code, due and owing the United States of America by the said defendants for the month of April, 1961, in the amount of $516.72, in violation of Section 7203 of Title 26 United States Code.

Twentieth Count

The Grand Jury further charges:

That on or about April 29, 1958, at Pittsburgh, in the County of Allegheny, in the Western District of Pennsylvania, the defendant Anthony M. Grosso, being a person engaged in the business of accepting wagers and in receiving wagers for or on behalf of another person or persons engaged in the business of accepting wagers, and as

such being required to pay the special tax imposed by Section 4411 of Title 26, United States Code, did wilfully fail to pay said tax as required by said section; contrary to the provisions of Section 7203 of Title 26, United States Code.

Twenty-First Count

The Grand Jury further charges:

That on or about January 1, 1959, at Pittsburgh, in the County of Allegheny, in the Western District of Pennsylvania, the defendant Anthony M. Grosso being a person engaged in the business of accepting wagers and in receiving wagers for or on behalf of another person or persons engaged in the business of accepting wagers, and as [fol. 26a] such being required to pay the special tax imposed by Section 4411 of Title 26, United States Code, did wilfully fail to pay said tax as required by said section; contrary to the provisions of Section 7203 of Title 26, United States Code.

Twenty-Second Count

The Grand Jury further charges:

That on or about July 1, 1959 at Pittsburgh, in the County of Allegheny, in the Western District of Pennsylvania, the defendant Anthony M. Grosso, being a person engaged in the business of accepting wagers and in receiving wagers for or on behalf of another person or persons engaged in the business of accepting wagers, and as such being required to pay the special tax imposed by Section 4411 of Title 26, United States Code, did wilfully fail to pay said tax as required by said section; contrary to the provisions of Section 7203 of Title 26, United States Code.

Twenty-Third Count

The Grand Jury further charges:

That on or about March 13, 1961, at Pittsburgh, in the County of Allegheny, in the Western District of Pennsyl-

vania, the defendant Anthony M. Grosso being a person engaged in the business of accepting wagers and in receiving wagers for or on behalf of another person or persons engaged in the business of accepting wagers, and as such being required to pay the special tax imposed by Section 4411 of Title 26, United States Code, did wilfully fail to pay said tax as required by said section; contrary to the provisions of Section 7203 of Title 26, United States Code.

[fol. 27a] Twenty-Fourth Count

The Grand Jury further charges:

That on or about April 29, 1958, at Pittsburgh, in the County of Allegheny, in the Western District of Pennsylvania, the defendant Samuel J. Grosso being a person engaged in the business of accepting wagers and in receiving wagers for or on behalf of another person or persons engaged in the business of accepting wagers, and as such being required to pay the special tax imposed by Section 4411 of Title 26, United States Code, did wilfully fail to pay said tax as required by said section; contrary to the provisions of Section 7203 of Title 26, United States Code.

Twenty-Fifth Count

The Grand Jury further charges:

That on or about January 1, 1959, at Pittsburgh, in the County of Allegheny, in the Western District of Pennsylvania, the defendant Samuel J. Grosso being a person engaged in the business of accepting wagers and in receiving wagers for or on behalf of another person or persons engaged in the business of accepting wagers, and as such being required to pay the special tax imposed by Section 4411 of Title 26, United States Code, did wilfully fail to pay said tax as required by said section; contrary to the provisions of Section 7203 of Title 26, United States Code.

Twenty-Sixth Count

The Grand Jury further charges:

That on or about March 13, 1961, at Pittsburgh, in the County of Allegheny, in the Western District of Pennsyl-
[fol. 28a] vania, the defendant Jennie B. Grosso being a person engaged in the business of accepting wagers and in receiving wagers for or on behalf of another person or persons engaged in the business of accepting wagers, and as such being required to pay the special tax imposed by Section 4411 of Title 26, United States Code, did wilfully fail to pay said tax as required by said section; contrary to the provisions of Section 7203 of Title 26, United States Code.

A True Bill,

....., Foreman.

Joseph S. Ammerman, United States Attorney.

In United States District Court

Motion to Dismiss Indictment—Filed February 18, 1963

Defendants move, pursuant to Rule 12 of the Federal Rules of Criminal Procedure, for an order dismissing the indictment against them, and the various counts thereof, on the following grounds.

1. The indictment and each count thereof should be dismissed on the ground that it was procured by the use of unlawfully obtained evidence. Defendants' motion for suppression of evidence, filed herein, sets forth the grounds upon which defendants assert that the evidence in question was unlawfully obtained. Defendants respectfully request that this phase of their motion to dismiss be decided after the hearing and determination of the motion for suppres-
[fol. 29a] sion of evidence, and in the light of the Court's

determination as to which if any items of evidence were unlawfully obtained.

2. Counts 1 through 19 should be dismissed on the ground that payment in the required manner of the ten per cent wagering excise tax allegedly due and owing by the defendants named in each of such counts would have entailed a violation of the constitutional privilege against compulsory self-incrimination. Such payment would have tended to incriminate the defendants under both federal and state statutes; and in particular would have tended to incriminate defendant Anthony M. Grosso on the charges contained in Counts 20 through 23 of the instant indictment, defendant Samuel J. Grosso on the charges contained in Counts 24 and 25 of the instant indictment, and defendant Jennie B. Grosso on the charges contained in Count 26 of the instant indictment. Accordingly, Counts 1 through 19 fail to charge an offense for which the defendants herein may be validly prosecuted.

James McLaughlin, 606 Frick Building, Pittsburgh 19, Pennsylvania; Thomas A. Wadden, Jr., 1000 Hill Building, Washington 6, D. C., Attorneys for Defendants.

[fol. 97a]

IN UNITED STATES DISTRICT COURT

OPINION ON MOTION TO DISMISS INDICTMENT—Filed January 9, 1964

In this criminal proceeding, defendants have filed a Motion to Dismiss Indictment, Motion for Suppression of Evidence and Motion for Bill of Particulars Ancillary to Motion to Suppress. By prior Order of Court, by agreement and stipulation of the parties, approved by the Court, and by Opinion and Order entered contemporaneously here-
[fol. 98a] with this Opinion and Order, the Court has dis-

posed of the Motions for Suppression of Evidence and for Bill of Particulars Ancillary to Motion to Suppress. It is the considered opinion of the Court that the Motion to Dismiss Indictment should be denied.

Defendants contend that each count of the indictment should be dismissed on the grounds that evidence which is the basis for the indictment was procured illegally. This contention has no merit. The Court has determined that the evidence described in Paragraphs 1, 3, 10, 15, 20, 21, 23, 24 and 25 of defendants' Motion for Suppression of Evidence was legally seized and defendants have withdrawn said Motion as to those items enumerated in Paragraphs 2, 6, 7, 11, 19 and 22 of said Motion. Certainly, any count of the indictment whose basis was the evidence enumerated in any of said Paragraphs of the Motion for Suppression is not open to attack on the ground of being based on illegally obtained evidence. As to the counts of the indictment based on the evidence enumerated in Paragraphs 4, 5, 8, 9, 12, 13, 14, 16, 17, 18, 26 and 27 of said Motion for Suppression of Evidence, which the government, without conceding such evidence was obtained as a result of an illegal search and seizure, has agreed not to introduce into evidence, it is the opinion of the Court that basing a count of an indictment on illegally obtained evidence is akin to basing such count on hearsay, which clearly is permissible. See *Costello* v. *United States,* 350 U. S. 359 (1956). Therefore, even if the evidence enumerated in Paragraphs 4, 5, 8, 9, 12, 13, 14, 16, 17, 18, 26 and 27 were illegally obtained, a question which the Court expressly does not determine, the use of such illegally obtained evidence is irrelevant where the issue facing the Court is whether a count of an indictment should be dismissed.

[fol. 99a] Defendants also contend that Counts 1 through 19 should be dismissed on the ground that payment in the required manner of the ten per cent wagering excise tax allegedly due and owing by the defendants named in each of such counts would have entailed a violation of the constitutional privilege against compulsory self-incrimination,

in that such payment would have tended to incriminate the defendants under both federal and state statutes.

In the opinion of the Court the legal issues raised by this contention are of no merit, having, in effect, already been determined adversely to defendants' position by the Court of Appeals. See *United States* v. *Joseph,* 278 F. 2d 504 (3rd Cir. 1960); *cf. Lewis* v. *United States,* 348 U. S. 419 (1955); *United States* v. *Kahringer,* 345 U. S. 22 (1953).

Conclusion

Since neither of defendants' arguments for dismissing the indictment is meritorious, the Motion to Dismiss Indictment should be denied.

An appropriate Order is entered.

Order

And Now, Therefore, This 9th day of January, 1964, defendants' Motion to Dismiss Indictment will be and hereby is denied.

Wallace S. Gourley, CDJ, Chief Judge.

cc: Gustave Diamond, Esq., United States Attorney.

[fol. 100a] James E. McLaughlin, Esq., for Anthony Grosso, 606 Frick Building.

Vincent J. Fuller, Esq., for Samuel Grosso, 1000 Hill Building, Washington 6, D. C.

Thomas A. Wadden, Esq., for Jennie Gross and Joseph Pino, 1000 Hill Building, Washington 6, D. C.

[fol. 104a]

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Criminal Action No. 62-281

UNITED STATES OF AMERICA, Plaintiff,

vs.

ANTHONY M. GROSSO, Defendant.

Transcript of Proceedings

* * * * * * *

[fol. 160a] MR. W. DEAN STRUBLE, called as a witness by the Government, being first duly sworn, was examined and testified on his oath as follows:

* * * * * * *

[fol. 162a] Cross examination.

By Mr. McLaughlin:

* * * * * * *

[fol. 163a] Q. Mr. Reich asked you about these wagering stamp files, and I believe you said that the District Director keeps an alphabetical file of the names of the persons in his district who have wagering or gambling stamps?

A. That is right, sir.

Q. And, that record can be used by myself or any other person who is interested?

A. That is right, sir.

Q. It is also true, is it not, that the District Director keeps as a public record an alphabetical listing of the names of all persons who have paid special taxes, including the occupational and the excise tax on wagering?

A. Well, when the wagering tax stamp is prepared and the name is put on that stamp—well, the stamp would not be prepared until the amount of money had been paid to obtain the special stamp. It would have to have been paid for the stamp to be prepared.

Q. You wouldn't get the stamp unless you came up with the $50?

A. That is right.

Q. But, I am referring now to the tax that must be paid or is paid on a monthly basis. Is it not a fact that there is kept as a public record an alphabetical listing of persons who have paid the excise tax as opposed to paying the $50? It is not, of course, disclosed what they paid or where, but there is a record that shows that they do pay excise tax on gambling?

A. Not a record as such.

Q. What do you mean by "not a record as such"?

A. Well, it would be on an individual basis. I mean, there [fol. 164a] is no listing to indicate those that filed Form 730 for the excise tax.

Q. You are here, I believe, representing the District Director who is Mr. Bingler?

A. Mr. Bingler, yes, sir.

Q. And, there are district directors all over the United States, and there is one director or one head of your service, is there not?

A. You mean in Washington, D. C.?

Q. In Washington, yes.

A. Yes, sir.

Q. And, who is that?

A. Mr. Caplan.

Q. Mortimer Caplan?

A. Mortimer Caplan, yes.

Whereupon, Defendant's Exhibit "T" was marked for identification.

By Mr. McLaughlin:

Q. Now, so that we understand one another, Mr. Struble, when we talk about the occupational tax on wagering, we

are talking about the $50 that you pay for the stamp, is that right?

A. That is right, sir.

Q. When we talk about the excise tax on wagering we are talking about the ten per cent on the gross receipts?

A. That is right.

Q. Now, Mr. Mortimer M. Caplan is presently the Director of Internal Revenue in Washington? Commissioner, they call him, I believe?

A. Yes, sir. He was the last I heard.

Q. He is the head of the whole service?

A. Yes.

[fol. 165a] Q. Mr. Struble, do you know whether from time to time Mr. Caplan as the Commissioner of Internal Revenue and head of the whole service in the United States writes and publishes articles dealing with the service—

Mr. Reich: If the Court please—

Mr. McLaughlin: —and the policies of the service?

Mr. Reich: If the Court please, at this time I would like to interpose an objection. I don't think this witness is here as an expert on what Mr. Caplan has written in any legal publications.

The Court: Well, if he knows, he can state. The objection is overruled.

(The last question was read.)

The Court: The question is whether he knows of that matter or not.

Mr. McLaughlin: Whether he knows that Mr. Caplan does this.

The Court: Yes.

The Witness: In a general way I know that he does, yes, sir.

By Mr. McLaughlin:

Q. Have you ever read any of the articles that he has written dealing with Internal Revenue matters?

A. Quite frequently. You mean public articles or internal articles?

Q. No, articles that he writes for publication that are published.

A. I believe I have. I don't recall a specific one, though.

Q. I show you what has been marked as Defendant's Exhibit "T" for identification, and ask you if you have ever seen this particular article written by Mr. Mortimer M. [fol. 166a] Caplan entitled "The Gambling Business and Federal Taxes"? I refer you to one page there which is marked.

A. I don't recall having read this particular article. Do you want me to answer with regard to that?

Q. Well, if you haven't read the article, you can't very well—

A. Well, I thought maybe you wanted my interpretation of that particular paragraph.

Q. Well, you have read the paragraph to yourself?

A. Yes, sir.

Q. Can you give an interpretation of it?

Mr. Reich: Your Honor, I object. He is asking the witness for a legal conclusion. The witness has already testified as to what the procedures are in this district. And, as far as cross examination is concerned, I don't think the defense counsel is entitled to go any further.

The Court: I think I will excuse the jury to consider this matter.

In the meantime, ladies and gentlemen of the jury, during this recess, you will refrain from talking among yourselves or with anyone else on any matter connected with this case or form or express an opinion about the case until it is finally submitted to the jury.

The jury may be excused.

(The jury left the courtroom and the following occurred out of the hearing of the jury.)

Mr. McLaughlin: Your Honor, in order that we may have maybe a little bit better understanding of what we are going

to discuss, I would like to hand this up to your Honor and refer you to the marked part here, and you will note what I was leading to.

[fol. 167a] The Court: Thank you.

(Interval.)

Is there any question in the mind of the counsel for the government that this article was written by the Commissioner of Internal Revenue—Mr. Caplan?

Mr. Reich: No. I have no personal doubt about that.

The Court: All right. I don't know of any purpose for this except to test the knowledge of this witness.

Mr. McLaughlin: No. There is another purpose for it. We contended and have always contended—and if required to go on appeal will continue to contend—that the requirements of this Act in requiring you to pay this excise tax and take out the stamp are a violation of the privilege against self incrimination. Now, the only purpose of bringing that statement of Mr. Caplan—

The Court: You are raising the Constitutional question of the validity of the law?

Mr. McLaughlin: That is right. And, the only purpose of bringing that question on the record was to show that Mr. Caplan, or to find out whether this is a fact, that Mr. Caplan has stated that when you pay the tax as well as when you get the stamp, that the District Director keeps an alphabetical list of that.

Apparently from reading that, they don't make the returns public. But, I would gather from reading that that they keep a list of persons who, one, have the stamp and, two, who are paying the excise tax.

Now, I made the distinction between excise and occupa-

[fol. 168a] tional tax with Mr. Struble, and we got that clear. Now, the sole purpose of putting this on the record is to preserve this constitutional question.

The Court: Well, you can preserve it just as well without it being on the record, can't you?

Mr. McLaughlin: Well, it would be difficult I think. The Court of Appeals might say, "Well, what evidence did you try to introduce as to whether the record is public or not".

The Court: I mean by that, that you have tried to introduce it. Now, if the Court should sustain the objection, you have laid the foundation that you can raise the constitutional question, haven't you?

Mr. McLaughlin: Well, I might unless I got caught on the hook of them saying "You will have to go back and put something on the record".

Mr. Reich: I don't know whether your Honor is aware that this contention was raised before trial and rejected by Judge Gourley as part of the motion to dismiss the indictment. Judge Gourley has rejected the contention that the excise tax provisions of the wagering tax clause are unconstitutional and and an abridgement of the the Fifth Amendment rights of the taxpayers. And, I see no purpose in laying a factual foundation on this record to advance such a contention later.

Mr. McLaughlin: No question about Judge Gourley having ruled on it. But, I am not talking about anybody ruling on it now.

The Court: Well, you have enough in the record to serve your purpose on appeal, haven't you?

Mr. McLaughlin: Well, that was just a legal argument. Factually it wasn't gone into much either way or the other. [fol. 169a] The Court: Was it a ground of the motion to quash?

Mr. McLaughlin: No. It was a separate motion to dismiss.

The Court: It was not a part of the motion to quash?

Mr. McLaughlin: On the motion to dismiss, the constitutional question was certainly raised.

The Court: And, that has been ruled on by Judge Gourley?

Mr. McLaughlin: Oh, yes. I wasn't going to press this much further, but this gentleman seemed to—

The Court: Well, that is the law of the case, I would think.

Mr. McLaughlin: Well, not to this extent, your Honor. When a trial court rules on a motion, say, to dismiss an indictment, that sort of thing usually doesn't preclude a defendant from putting something in or adding something to the actual trial record which he feels is necessary for an appeal.

The Court: Well, you have it on the record your contention that you would make before the court of appeals that gambling, being illegal and the fact that there would have to be publication or the names made available to the public of persons who are so engaged in the gambling business, that this violates the constitutional provision? Is that your position?

Mr. McLaughlin: Almost. The constitutionality of the wagering tax has already been upheld as not being a violation of the privilege against self-incrimination for the simple reason that by taking out the stamp you aren't admitting that you are in the business of wagering, because you may not have done it yet. However, by paying the tax, [fol. 170a] the excise tax, the ten per cent, there of course you are clearly indicating that you are in the operation of a lottery or whatever the type of gambling is.

The Court: Well, now, if you pay the tax, don't you waive the constitutional question? If you want to stand on the Constitutional question that the tax is illegal by being in conflict with the Constitution, why should you pay it? Why did you pay it?

Mr. McLaughlin: Well, if you don't pay it, you go to jail.

The Court: Don't you have a chance to go to court?

Mr. McLaughlin: If you do pay it—

The Court: Can you be convicted without a trial?

Mr. McLaughlin: Oh, you can't be convicted without a trial, but—

The Court: Or, can you be placed in jail without the right of bail while awaiting a trial?

Mr. McLaughlin: If it is public, your paying of the tax is made public if they keep a list of it.

The Court: Yes.

Mr. McLaughlin: While gambling isn't against the laws of the federal government, it is in this case and in this state against Pennsylvania Law. So, you are automatically admitting to the Pennsylvania authorities that you have engaged in an illegal activity, you see.

The Court: Well, the same thing about a person who has to pay a narcotics tax. The government taxes narcotics right along. I don't know of any state that authorizes the sale and use of narcotics except through proper channels [fol. 171a] for medical treatment by a physician. What is the difference in the situation?

Mr. McLaughlin: Well, I don't intend to belabor the thing at all.

The Court: I am going to sustain the objection. The objection is sustained.

* * * * * * *

[fol. 236a]

MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF GOVERNMENT'S EVIDENCE—Filed February 18, 1964

And Now come the defendant, Anthony M. Grosso, by his attorney James E. McLaughlin, Esquire, and moves for a Judgment of Acquittal as to all counts of the Indictment at the close of the Government's evidence, for the reason that such evidence is insufficient as a matter of law to sustain a conviction. Specific grounds which relate to the respective counts are set forth hereinafter.

The grounds which relate to Count One of the indictment are as follows:

1. The Government has failed to prove there is a tax liability due and owing and thus has failed to prove the essential intent to defraud. This ground is more fully set forth in Secs. II and III of defendant's memorandum, at pp. 4-10.

2. The inadmissibility of Government Exhibit One renders the evidence on this Count insufficient. This ground is more fully set forth in Sec. IV of defendant's memorandum, at pp. 11-15.

3. The Government's proof shows that the defendant has been charged under the wrong provision of 26 U. S. C. Sec. 4401. This ground is more fully set forth in Sec. VI of defendant's memorandum, at pp. 16-18.

4. The Government has failed to prove defendant could have paid the excise tax without risk of self-incrimination in violation of his Fifth Amendment rights. [fol. 237a] This ground is more fully set forth in Sec. VII of defendant's memorandum, at pp. 18-21.

5. The Government has failed to prove the conspiracy alleged in Count I in that it has failed to prove the purpose of the alleged conspiracy was to defraud the United States; and in that its proof tends to show multiple conspiracies rather than the single conspiracy alleged. This ground is more fully set forth in Sec. IX of defendant's memorandum, at pp. 21-23.

The grounds which relate to Count Two of the Indictment are as follows:

1. The Government has offered no proof of excise tax liability for this period covered by this Count. This ground is more fully set forth in Sec. I of defendant's memorandum, at pp. 1-4.

2. The Government has failed to prove that there is a tax liability due and owing by the defendant on this count, because it has not shown whether the excise tax was paid by the writers or branch managers. This ground is more fully set forth in Sec. II of defendant's memorandum, at pp. 4-9.

3. The Government has failed to prove the alleged excise tax liability has not been paid by the defendant's alleged partners. This ground is more fully set forth in Sec. III, of defendant's memorandum, at pp. 9-10.

4. The inadmissibility of Government's Exhibit One renders the evidence on this count insufficient. This

[fol. 238a] ground is more fully set forth in Sec. IV of defendant's memorandum, at pp. 11-15.

5. The Government's proof shows that the defendant has been charged under the wrong provision of 26 U. S. C. Sec. 4401. This ground is more fully set forth in Sec. VI of defendant's memorandum, at pp. 16-18.

6. The Government has failed to prove defendant could have paid the excise tax without risk of self-incrimination in violation of his Fifth Amendment rights. This ground is more fully set forth in Sec. VII, of defendant's memorandum, at pp. 18-21.

7. The Government's proof shows a different partnership from that alleged in the indictment. This ground is more fully set forth in Sec. VIII of defendant's memorandum, at p. 21.

The grounds which relate to Counts Three through Fifteen are the same as the grounds specified with respect to Count Two, with the exception of the ground set forth in Paragraph One of such grounds.

The grounds which relate to Counts Sixteen through Eighteen are the same as the grounds specified with respect to Count Two.

The grounds which relate to Count Twenty of the Indictment are as follows:

1. The Government has failed to offer proof of any amount of excise tax liability for the month to which this count relates, and accordingly, has failed to establish the occupational tax liability alleged in this [fol. 239a] count. This ground is more fully set forth in Sec. I of defendant's memorandum, at pp. 1-4.

2. The inadmissibility of Government's Exhibit One renders the evidence on this count insufficient. This ground is more fully set forth in Sec. IV of defendant's memorandum, at pp. 11-15.

3. The Government's own proof establishes that one or more of defendant's alleged partners had an occupational tax stamp during the period covered by this count, and thus negates defendant's liability for the occupational stamp alleged in this count.

4. The Government's proof shows that the defendant has been charged under the wrong provision of 26 U. S. C. Sec. 4401, and thus has been erroneously charged under Sec. 4411. This ground is more fully set forth in Sec. VI of defendant's memorandum, at pp. 16-18.

Counts Twenty-One and Twenty-Two of the Indictment are the same as the grounds specified with respect to Count Twenty, with the exception of the grounds set forth in Paragraph One of such counts.

The counts which relate to Count Twenty-Three of the Indictment are the same as the grounds specified with respect to Count Twenty.

James E. McLaughlin, Esquire, Atty. for Deft.—
Anthony M. Grosso.

Submitted: February 18, 1964.

[fol. 321a] PROCEEDINGS

Friday, March 6, 1964, 11:45 a. m.

The Court: Let the record show that the Court is in session.

The defendant's counsel is present and the defendant is absent. Will you waive the presence of the defendant?

Mr. McLaughlin: Yes, your Honor.

The Court: And also stipulate that the proceedings had here will have the same force and effect as if they were done in open court in a regular session of the Court?

[fol. 322a] Mr. McLaughlin: Yes, your Honor.

The Court: All right.

I ask counsel this question, this to Mr. McLaughlin, counsel for the defendant; if he would consent to having the Court order the jury to resume deliberations this afternoon, during this afternoon, because the doctor has informed me that she would be ready in four or five hours physically to resume her work, and that call came in here to this room about 10:30 this morning.

I will now ask counsel whether or not he will consent to having the jury resume deliberations this afternoon.

Mr. McLaughlin: Counsel for the defendant will not or does not consent, your Honor, to the jury resuming its deliberations this afternoon, and moves for a mistrial and/or the discharge of the jury at this time for the following reasons; and these reasons are the reasons why the counsel for the defendant does not consent.

The jury has been out for many, many hours now. On the evening of the second day of deliberations, counsel for the defendant was informed that one of the jurors had taken ill and required medical attention. Shortly thereafter, some time after 11:00 last night, counsel for the defendant was informed that a second juror had taken ill and also required medical attention.

Counsel for the defendant was informed this morning that the first juror who needed and required medical attention had some type of a relapse or set-back this morning and required further medical attention, and that the doctor indicated that she needed four or five more hours' rest before she could begin—before he could say that she could be able to deliberate again as a juror.

The juror was medicated, I understand, although I don't know what type of medication she has had, and I think [fol. 323a] the type of medication she has had, depending on what it is, could well affect her judgment. If she got ill last night and got ill again this morning, she is obviously not in the best physical condition, and I don't feel that she

should be subjected to any further deliberation, and I don't think defendant should be required to have his fate decided by a jury some of whom, perhaps two, at least one we know, are not now well.

As I understand it, the diagnosis is that she had some sort of a neuro circulatory edema, and, of course, it is impossible to tell what effect this has on other jurors. No one knows, of course what the status of the jury is at all, but we do know that some time yesterday morning, I believe the jurors sent word to your Honor that even at that early hour they were unable to agree; at least, that was the report that was given to me by the U. S. Attorney, that they had sent word down before lunch, about 11:30, that they were unable to agree and they were told to continue work. Obviously, they did continue working at the direction of the Court, and then at the end of the day, these two persons got ill.

I feel that they have been out long enough, and this fact of the illness of one juror and the illness of another could well in this circumstance result in some sort of a compromise verdict, and for that reason, we would move that the jury be discharged.

Also, so the record shows, the jury has been separated, at least to some extent. Of course, in all fairness to the Court, I will put on the record what I said to the Court last night. When consulted, I, of course, stated I had no objection to any of the jurors who were ill getting medical attention. Obviously, no attorney is going to take the position that a juror should be permitted to die on the court-[fol. 324a] room floor for want of a doctor. However, there has been, to some extent, a technical separation. I don't know what the circumstances are today. I don't know whether she is with the rest of them or separated from them.

The Court: She is with the rest of them. The doctor so informed me.

Mr. McLaughlin: There at least has been a technical separation.

So, for all those reasons, we would move that the jury be discharged.

The Court: Are you through?

Mr. McLaughlin: Yes, your Honor.

The Court: All the members of the jury apparently were working up until just a few minutes before 11:00 p.m. last night. At that time, I received a telephone call from the clerk, who has acted as clerk throughout this trial, that the jury was retiring for the night, going to a hotel.

Now, during this trial, since the case has been submitted to the jury, I have been available to the clerk and, through him, to anyone else interested in the case that might want to reach me for some reason, but the only conversations I have had with anyone up to 11:00 last night was with the clerk.

So, he informed me that the jury was on its way or going to retire for the night. Shortly after that, I don't know just how long it was, I was informed that one of these ladies was injured. I think she was on her way into the elevator, wasn't she?

The Clerk: She was on her way to the elevator, your Honor.

The Court: Going to the hotel?

The Clerk: To the hotel.

[fol. 325a] The Court: So, I think I inquired of the clerk whether the lawyers were available or where they were at the time. I think he said Mr. McLaughlin was around, wasn't he, and Mr. Reich and Mr. Diamond were both around.

The Clerk: I had to call Mr. McLaughlin. He wasn't here at the time and I called him and asked that he would come in. Mr. Diamond and Mr. Reich were present.

The Court: I think I requested you to inform counsel, didn't I?

The Clerk: That is correct, sir.

The Court: Well, then, I received another call to the effect that the second lady had become ill. I don't know how long after that was. I think I had the conversation

with Mr. McLaughlin where we talked about this being a sort of an unusual situation.

Shortly after I finished that conversation, I was informed by the clerk that the second lady had become ill.

I was also informed by the clerk that these two ladies were brought in this room, and the clerk has stated today that the other members of the jury were outside.

The Clerk: In this courtroom, sir.

The Court: In this courtroom, which is about 20 feet away from her, or 25 feet.

Did the doctor come here?

The Clerk: The doctor came into this room, yes.

The Court: How long was he here with them?

The Clerk: I presume something like 15 to 20 minutes, possibly. That is my recollection of the time.

The Court: After that, what was done with the two sick ladies? Was there only one here at that time, one sick woman?

The Clerk: There were two here. I wasn't in here at all. I didn't know who they were. I saw the doctor going down [fol. 326a] the hallway with a marshal and I asked him about their condition, and I told him I would like to have you talk with him.

The Court: Well, do you know how long after the doctor left that these two ladies joined the rest of their associates on the jury?

The Clerk: I would say a few minutes; maybe five minutes at the most, they were taken back into this courtroom.

The Court: How long, from what you saw last night, were they separated from the body of the jury; from the other members of the jury, approximately?

The Clerk: Possibly three-quarters of an hour at the most.

The Court: No more than an hour, at any rate?

The Clerk: That is right, that is my approximation.

The Court: And they have been together ever since and they are still together?

The Clerk: They have been ever since, and they are still together at the hotel, sir.

The Court: So there is only a separation involved here of an hour at the most?

The Clerk: That is correct, to my recollection.

The Court: An hour at the most?

The Clerk: Yes, sir.

The Court: So I am going to deny the motion for a mistrial and I am going to order, and it is ordered that the jury resume deliberations this afternoon in the regular place provided by law and the authorities here in this building for that purpose. I don't know if it is provided by law or not, but it is provided by the authorities in control of this building.

Now, if it should appear that she is not able to participate in the work of the jury today, we will meet again [fol. 327a] tomorrow morning at ten o'clock to see what her condition is and see whether she can do it or not.

Mr. Reich: Your Honor, if I may—

The Court: I want to hear from you. If you have got anything to say, I would like to hear from you.

Mr. Reich: I don't want to say anything about the merits because Mr. Diamond is going to speak on that, but to supplement your narration of the facts, I think the record should show two more things.

It is my understanding that the entire time the two jurors were separated from the rest of the jury, and I think Mr. Rittinger can verify this, they were under the supervision of one of the marshals who was sworn to talk to them. They were under supervision so that no one else could talk to them.

The Court: I am glad you mentioned that. It is true, isn't it?

The Clerk: That is true. I had a marshal placed at the door so no one could look in the door or communicate with them.

The Court: And there was no contact by any other person with those jurors while they were in this room, except the doctor and a marshal?

The Clerk: And the two bailiffs that were sworn to take care of them.

The Court: Yes, and the bailiffs.

Mr. Reich: In addition to that, I understand that Mr. Rittinger personally advised and instructed the doctor not to discuss any aspect of the case with either juror.

The Clerk: I did so, and he said that was part of his medical ethics. He said he would not. He said he didn't even know the names of the two patients whom he had treated.

[fol. 328a] The Court: I see.

Mr. Reich: I think that would complete the part about that.

The Court: I am glad you mentioned it. I had that in mind and I forgot it.

Mr. Reich: And also the other ten jurors were under the supervision of other bailiffs.

The Court: They were under supervision, were they not, or were they?

The Clerk: At the same time, sir.

The Court: And no one was in contact with them at any time? No one has contacted any member of this jury since it was submitted to the jury?

The Clerk: Not at any time to my knowledge.

The Court: Except those who are duly authorized by law to do so?

The Clerk: That is correct, sir.

The Court: And for the purposes authorized by the law and no other purpose?

The Clerk: That is correct.

The Court: Now, anything else?

Mr. Diamond: Yes. The Government takes the position, as the Court has already ruled, that the jury should continue their deliberations. This case has taken, as we all know, five weeks to try. The Government introduced some 76 exhibits; the defendant over 30 exhibits; there are 21 counts that the jury has to consider against this defendant. Under those circumstances, it is not unusual that a jury

would not agree after one day's deliberations and, in fact, would be most unusual if they did agree in such a period of time.

We think also that notwithstanding the Court's clear instructions on the point, it is possible the jury doesn't un- [fol. 329a] derstand what a deadlock is. The jury may feel that if they can't agree on all points, they are deadlocked; and in that regard I will have something to say at the end of this.

Now, as to the separation of the jury, I think there has been, at most, as Mr. McLaughlin indicated, a technical separation, not a separation as one might expect if a juror was permitted to go home or to be in the presence for any period of time of individauls who have not been instructed directly or indirectly by the Court as to not speaking with a juror concerning the case. I think we all know that during the course of deliberations a jury is many times separated in a sense. Jurors have occasion to go to the washroom and there is a separation for a period of time then. When they go to the hotel, I don't think that they are always all in the same room. Obviously they are not; the men and the women are separated. These separations are recognized in the law and they are not at all improper.

For that reason, we don't think that the question of separation here in any way vitiates the deliberations of the jury or would require that a mistrial be declared.

It would be the request of the Government that when the jury is returned for deliberations, that prior to entering into their deliberations again, the Court reread the last instruction, Instruction 35, with emphasis on that portion of the instruction which indicates that the jury may agree on a count or a number of counts and disagree as to others and point out that such a verdict would not be improper, and that if the jury does not agree on all points, they are not deadlocked; and the jury should be instructed that when they have arrived at a verdict as to any count they may return that verdict to the Court.

[fol. 330a] The Court: Well, I think the order that I made covers the views expressed by counsel here.

Mr. Diamond: It does.

The Court: Now, we have an instruction there as to counts; that they can convict on one count, acquit on one count, and so on and so forth, or disagree to one or more of the counts.

Mr. Diamond: That is already in your Honor's instructions.

The Court: I doubt that that is the trouble. I think that they have probably read the instructions pretty carefully, because I gave them the instructions. It illustrates one of the views that I have on that question. It is impossible for a body of laymen to sit and listen to a judge read something for an hour and take very much out of the courtroom with them. I think that making a rule to the contrary would be just taking the wind out of all the instructions. There would be no effect to them at all, or a good many of them. The jury would never think of some of them again, especially in a long trial where there are a good many instructions.

Well, that is the way it stands. Now, I don't know how I will act on that suggestion. If they meet today and we find out tomorrow they are still in disagreement, I might call them in about one o'clock tomorrow afternoon and ask them if there is any possibility of agreement. I am not going to ask them how they stand numerically, that is contrary to the decision of our Supreme Court. I am not going to do that, but I am going to ask them if there is any hope of an agreement. I don't see any objection to that.

Mr. McLaughlin: No, I have no objection to that. We would object to there being some sort of a special charge this afternoon. I don't think there is any need for it. You [fol. 331a] have given them your instructions, which was over my objection, anyway, but at least they have them now.

The Court: And I might then call their attention to some of these instructions again on this very point.

Mr. McLaughlin: At this point, they haven't asked for any further instructions and I think today it is premature.

The Court: And there is another reason why I don't believe that that is the problem; because the formal verdict, they have got that, and that shows on its face that each count is treated separately in that verdict. Each paragraph pertaining to a count there is a separate verdict of itself, so it is not likely that that would be a question. Now, I don't know what else we can do.

Mr. McLaughlin: There is just one other thing, your Honor, I would like to put on the record; at least one other request I would like to put on the record. That is, as I understand, one of these jurors has been given some kind of medication.

The Court: Pills, that is all I know, for her nerves.

Mr. McLaughlin: I think, just to keep the record straight and for the purposes of the record, some efforts should be made to determine what the type of medication is and put it in the record.

The Court: I want to avoid suggesting ideas to counsel, but the thought occurred to me as you mentioned that before that if there is a conviction in this case, you could find out from the doctor; and if you need a court order to find out, you will get one to find out the nature and the effect of the medication that was given to this individual, and we can get the doctor here and get an opinion from him whether or not it was such a type that would cause a person to be incapacitated to think normally; and, if so, how long that condition would endure.

[fol. 332a] Now, if she is in there two or three days, that point is minimized. If she would go right in and the jury would walk right out with a verdict, there might be some question of whether or not she was—a vague question and a very slight fly speck of a question. I don't think that any doctor would say that a woman could go and resume jury duty after he has prescribed something that would act as an opiate or curtail her mental activity in any degree. I don't think a doctor would do that, but I am going

to see that you have an opportunity to make a motion or two for a new trial. That is where that could come up.

Mr. Diamond: In that same vein, I am not sure that the record is clear on this. As I recall, and Mr. McLaughlin and I were in the presence of the doctor when he was discussing this with your Honor last night, the doctor indicated—

The Court: You were present when the doctor was speaking to me, were you?

Mr. Diamond: Yes, sir, we were in chambers.

The Court: Was Mr. McLaughlin there, too?

Mr. McLaughlin: Yes.

Mr. Diamond: Yes, he was, and that was at Mr. McLaughlin's request.

The doctor indicated that the jurors who had been ill were in no danger, that they need not be separated. As a matter of fact, I believe he also indicated that they did not want to be separated from the other jurors and that they could resume their deliberations. And as I recall, it was stated here this morning—although I certainly haven't spoken to the doctor—the doctor indicated that the juror that he treated this morning would be able to resume deliberations after four or five hours, and that was at some time after ten this morning, and four or five hours would be after two this afternoon, something in that area.

[fol. 333a] The Court: I would like also to have the marshal informed—I think we talked about it before—not to remove either one of these ladies to a hospital without instructions of the doctor. If the doctor says either one of them should go to the hospital, that is it. Their comfort and their health is more important than a lot of other things we have to contend with.

Doesn't that cover everything now?

Mr. Wadden: Could you indulge us just one minute, your Honor?

The Court: Certainly.

(Discussion off the record.)

Mr. McLaughlin: There is one other point that I think should be considered, and that is the doctor has indicated, apparently this morning, that this juror should be able to deliberate again after four or five hours' additional rest and whatever medication she has taken; and that, of course, is obviously the doctor's opinion. I think some effort should be made to determine—this could be made by the Court through the marshal—whether the juror herself feels personally that she is able to continue. In other words, some times a doctor can look at me and tell me, "You ought to feel pretty good—"

The Court: I think that the marshal would probably ask her how she feels and he wouldn't take her down to the jury room until she felt that she could. You can call the marshal's attention to that. I hate to do it because I think it is obvious that he would do that. He would find out if she was ready to go, and if she wasn't and she said she wasn't quite ready, he would wait a little while longer and then ask her again and then get in touch with the doctor.

[fol. 334a] The Clerk: I will see that the information is conveyed to the marshal.

The Court: I am sure that he would do it, regardless, and you tell him how I felt about it. I am sure he would do it without the suggestion, but I am doing it on request of counsel.

Mr. Reich: Your Honor, we have one further thought over here. As we were discussing before, this is the first time within the memories of all of us that such an event has occurred, and we are sure that because of this event the jury is somewhat confused at this point and may be somewhat excited, and it is our feeling that perhaps your Honor, when they do continue deliberations this afternoon, could call them back into court and reassure them—nothing in the nature of a special charge, but maybe a reassuring word to them would have a very beneficial effect in view of what has gone on in the last 24 hours or so.

The Court: Well, I will have to stop and think about that for a moment. They know the ladies were sick and they know that they both had medical advice from the doctor. They know why they haven't been in session, and they will know that she is ready to go. She will talk to them and tell them. I don't want to do that. I appreciate your bringing the thought up, but I don't think I wish to do that. They will go back to work and it doesn't make much difference whether they have any explanation, really, for this delay or not. They can blame the judge for it; they won't blame counsel for it, but as a matter of politeness, I would bring them into court and inform them if I didn't think they already knew.

Mr. McLaughlin: As they say, if they have all been together, they must know.

The Court: I think so. I don't think it is necessary to [fol. 335a] do that. The less that the Court has to do with them in bringing them in and bringing them out, it is better. They sometimes get ideas that the Court—ideas as to what the Court has conveyed to them and entirely opposite of what the Court wanted to convey to them. I will just leave them alone and let them go back to work without any more ado. That is what I think.

Mr. McLaughlin: That is what I think.

The Court: Now, what else is there? Do you have something?

Mr. Wallace: Do you think we should now call these families of these jurors?

The Court: I am going to ask the clerk to communicate with the families of the jurors and tell those other than the families of these two sick ladies that it is not their juror that is sick, and then to notify the families of the two ladies, the condition that these ladies are in so that they won't be unduly alarmed. I think we brought that up before and counsel thought it was a good idea too.

Mr. McLaughlin: Yes.

The Court: So that is everything we can do.

(Whereupon, at 12:20 p. m., a recess was taken.)

PROCEEDINGS

Saturday, March 7, 1964, 2:45 p. m.

The Court: Let the record show the presence of the defendant with counsel, and the United States Attorney and his assistant, Mr. Reich, are here; Mr. Diamond and Mr. Reich.

Can we stipulate that the proceedings had here will have the same force and effect as if they were done in open court?

[fol. 336a] Mr. McLaughlin: Right.

Mr. Diamond: Yes, your Honor.

JURY DELIBERATION AND SENTENCE

The Court: The jury having resumed deliberating, it is apparent that it is possible that we will be engaged over Sunday, I have asked counsel if they would stipulate that a marshal may escort them to the church of their choice tomorrow, tomorrow being Sunday, whichever church they wanted to go to.

Mr. McLaughlin: We would stipulate that if they are still in deliberations. I have something to say about that and I guess it can go on the record now.

The record already discloses that yesterday, of course, I made a motion to have the jury discharged. I made a motion for a mistrial. I don't know whether it appears of record or not, but the jury, as I understand, did not deliberate yesterday at all, to my understanding of it.

The Court: Is that so? Is that the fact?

Mr. Diamond: I believe they did not.

Marshal Berry: They did not.

Mr. McLaughlin: That is my understanding.

The Court: All right.

Mr. McLaughlin: I understand, and I know, that a certain juror who was ill yesterday apparently had some further difficulty this morning and was seen by a Dr. Stoffan. After we met here this morning, I called the doctor, Dr. Stoffan, to find out not who she was, nor did

he tell me, but just generally what her condition was. He told me that, say, about 12:15 today, in his opinion she was extremely sick, she was suffering from total nervous prostration. He said in his opinion he didn't see how she —he said he was going to see her again tonight—he didn't think that she would be in shape to deliberate any more [fol. 337a] today or even tomorrow, and that he felt she was suffering from not only nervous prostration, but he said that in his opinion an acute mental depression, which he termed a neurosis, and for which he said he thinks she is going to require psychiatric care.

Now, in view of that, in view of her being in that condition, if that is the opinion of the doctor, which it is, I assume, since he told me over the phone, and as far as I know no other medical person has seen her—in other words, he was the doctor that was selected by the Government, or actually I think by the Assistant District Attorney of Allegheny County, the other night, on Thursday night, I guess. If that is his opinion, and it is, it appears to me that this woman is not in condition to properly deliberate and properly evaluate the situation. Certainly anyone who is going to need psychiatric care and who is in a deep mental depression is just not timber for good jury deliberation.

So, as I say, if they were going to deliberate tomorrow, I would have no objection to anyone going to church. I feel at this time it is incumbent, in view of what Dr. Stoffan told me, to again renew my motion for a mistrial and to discharge the jury. I feel that with the woman's condition such as it is, she is just being imposed upon severely and she is not in the kind of mental condition that is required of a dispassionate consideration and discussion of the issues involved here.

Accordingly, we renew our motion for a mistrial based on the opinion of the doctor selected by the Government to examine this woman.

The Court: Would you consider stipulating that this case could continue under Rule 23, Subdivision (b), with a jury of eleven?

[fol. 338a] Mr. McLaughlin: I had given that some consideration, your Honor. I am familiar with the practice under that rule, but we have determined that it would not be in the best interest of our client to so stipulate.

The Court: What has counsel to say?

Mr. Diamond: At the very outset—

The Court: Mr. Diamond.

Mr. Diamond: —I would like to clear up something on the record. I hope Mr. McLaughlin didn't mean it the way it sounded, but the other evening, Thursday evening, when this juror became sick about 11:15 or so at night, I think just about everyone who was in the area of the courtroom was attempting to get medical attention for that sick juror. I tried to get medical attention, Mr. Reich called, I don't know whether some of the other individuals that were also on the phone—the primary object was to get immediate medical attention. We didn't know what her problem was or how serious it was.

Mr. William Claney Smith, whom we have heard mentioned before, happened to have been with us that evening. He knew of a doctor and he called Dr. Stoffan, who I think we are all happy was able to get down here. I believe also we had contacted your Honor and your Honor had indicated that we should attempt to get medical attention. We called the Physicians' Emergency number where we had hoped to be able to get someone to come down at that hour of the night. We didn't have any immediate success there. We called several of the downtown—one of the downtown hotels for their house physician because I thought that would be closer. We called Allegheny General Hospital, and the first one that we were able to get to come down here was Dr. Stoffan. The doctor wasn't picked by the Government; the doctor was picked by [fol. 339a] necessity. So, I would like the record to be clear on that particular point.

Mr. McLaughlin: We have no objection to the doctor.

Mr. Diamond: I am sure you don't Mr. McLaughlin.

Now, I don't know what the doctor's report is on the current physical condition of the juror. It is apparent that they are all here now. I know of no request having been made by the juror to be excused because of medical reasons. I should think that the doctor would get in communication with the Court before if he felt that the juror wasn't capable of further deliberations, that he would have advised the Court and not defense counsel. Certainly, the statements of defense counsel are not evidence in this case in any way at this particular time.

This jury has been deliberating probably no more than 15 hours. The particular juror has had a day and a half, almost two days of constant rest, and certainly medical attention has been afforded her during that particular period of time. This case took a month to try, over a hundred exhibits are in evidence. There is important interest at stake, not only for the defendant but for the Government as well, and I don't think that we should lightly dismiss this jury at this time unless we have some firm indication from an impartial source, or perhaps from the juror herself that she is unable to continue her deliberations.

The Court: Evidently, the doctor hasn't seen this lady since rather early this morning, has she?

Mr. Berry: No, the doctor was there this afternoon.

The Court: He was there this afternoon?

Mr. Berry: That is right.

The Court: What time was he there?

Mr. Berry: I believe it was around 1:00, 1:15.

[fol. 340a] The Court: Did he have anything to say at that time?

Mr. Berry: Nothing direct from the doctor.

The Court: Did you hear him say anything to the effect that she would not be able, mentally or otherwise, to participate?

Mr. Berry: Well, Judge, suppose I bring in the chief deputy who was in contact with the doctor. Would that be all right?

The Court: Yes.

Mr. Berry: Judge, I was in error, that was 9:35 this morning that she was examined the last time.

The Court: Oh, 9:35?

Mr. Berry: Yes.

The Court: I think we had heard—

Mr. McLaughlin: That is what the doctor told me, that he had seen her around 9:30.

The Court: And I think in some former conference we had here the marshal or deputy marshal told us what the doctor said, didn't he, at that time?

Chief Deputy Marshal Morphy: Yes, sir.

Mr. McLaughlin: Not today, not this morning.

The Court: Did you hear the doctor talking to this lady, whoever she may be, at 9:35 or approximately that time this morning?

Mr. Morphy: No, sir, I was here this morning when my deputy called, but I talked to the doctor personally at about 9:45. He did see her about 9:30.

The Court: And did he describe her condition to you?

Mr. Morphy: He stated that she was suffering a psychiatric depression at that time to me, and he stated then that he would probably be back at 7:00 this evening after he eats supper.

Mr. McLaughlin: That is what he stated to me, too, that he was going to come back tonight.

[fol. 341a] The Court: And did you discuss with him the possibility or probability of her being able to resume work and deliberations as a juror?

Mr. Morphy: Yes, I did.

The Court: What did he say?

Mr. Morphy: He stated it would be entirely up to the juror herself as to her condition.

The Court: Whether she would be able to do it or not?

Mr. Morphy: Right.

The Court: Do you want this witness sworn to testify?

Mr. McLaughlin: I don't think he need be sworn.

The Court: Do you care to have the marshal sworn?

Mr. Diamond: No.

Mr. McLaughlin: I guess he ought to be identified by name, though.

The Court: Yes, let's do that.

State your name.

Mr. Morphy: Robert S. Morphy, Chief Deputy United States Marshal.

The Court: In this district here, the Western District of Pennsylvania?

Mr. Morphy: Yes, the Western District of Pennsylvania.

The Court: Is there anything further you would like to ask the deputy marshal?

Mr. Morphy: I would like to state further that as I spoke to the doctor, I also told him or asked him if he would be on call if I needed him for any emergency medical treatment for her, and he stated that he would be. My chief concern was for the juror.

The Court: Has the jury yet resumed deliberations?

Mr. Morphy: As far as I know.

The Court: With this particular lady, the sick lady present?

[fol. 342a] Mr. Morphy: She is in the group of twelve jurors, yes, sir.

The Court: Did you see her?

Mr. Morphy: Yes, sir.

The Court: How did she appear to you?

Mr. Morphy: She seems a little weak. She walked in, she got into the cab under her own power, and she walked in with one of the other jurors in the courtroom as we came down the hall. She walked from her room to the elevator, from the elevator to the taxicab, and also from the cab to the deliberation room.

The Court: Did you have any conversation with her?

Mr. Morphy: Only as to how she felt, and she told me a little bit weak.

Mr. Diamond: May I ask something?

The Court: Yes, sir.

Mr. Diamond: Did she indicate that she did not want to come down?

Mr. Morphy: When we left the room?

Mr. Diamond: Yes.

Mr. Morphy: No, sir, she didn't.

Mr. McLaughlin: As I understand it from what I heard from the doctor, she tried to get up for breakfast and her knees just sort of buckled, or something, and, in other words, she went back to bed.

Mr. Morphy: This morning? That may be possible. I wasn't in the room. One of the women deputies was in the room.

The Court: The doctor didn't tell you that her knees buckled, did he?

Mr. Morphy: No, sir.

The Court: Or she didn't tell you that?

Mr. Morphy: No.

[fol. 343a] The Court: Is there anything further?

Mr. Diamond: I have nothing further.

Mr. McLaughlin: No, I have nothing further from Mr. Morphy.

Mr. Morphy: Thank you, your Honor.

The Court: Much obliged to you, sir. Thank you.

This may be in the record without the formality of swearing the witness?

Mr. McLaughlin: Mr. Morphy's statement, yes.

The Court: It will have the same effect as if he was sworn?

Mr. McLaughlin: Yes, sir.

Mr. Diamond: Yes, your Honor.

The Court: Now, what is the question we were interested in here?

Mr. Diamond: You were inquiring as to whether Mr. McLaughlin would stipulate that the jurors—

The Court: Oh, yes, and he signified that it is his desire not to do so.

So, I think that we can come to recess now awaiting the pleasure of the jury.

Mr. Diamond: I think the record should show, of course, that the Government is willing to stipulate that the jurors may go to the church of their choice tomorrow.

The Court: Of course, you haven't done so. Go ahead, sir.

Mr. Diamond: And also, we would at this time suggest to the Court that perhaps the Allen charge might be in order.

Mr. McLaughlin: We would object to the Allen charge being given at this time, particularly, for the reason that with one juror feeling not well, since she indicated she feels weak and the doctor has said that she is suffering from some sort of a psychiatric depression.

[fol. 344a] The Court: I won't give it at this time.

Mr. McLaughlin: I think it is just too much at this time.

The Court: I won't give it at this time.

Mr. Diamond: Very well.

The Court: I will consider doing so at a later time.

Mr. McLaughlin: So the record is clear, do I understand that my renewed motion is denied?

The Court: Yes.

And it can be arranged that these people can have a deputy marshal take them to the church of their choice? I hope they don't go to twelve different churches.

Mr. Berry: Well, Judge, we will arrange it so they can all get to church.

Now, are they to deliberate tomorrow?

The Court: I don't see any reason why they couldn't. A verdict can be returned on Sunday, can't it? Let's look and see. I am pretty sure it can.

The reason that I made that remark is that if the rule contemplates a verdict coming in on Sunday, it contemplates also deliberation on Sunday. It is not a non-judicial day in the federal system, is it, Sunday?

Mr. Diamond: Not to my knowledge.

The Court: If the case has been given to the jury, I don't see why they should have to sit around and play cards all day or twiddle their thumbs. I don't see why they couldn't continue to work.

Mr. McLaughlin: I don't know. It has never come up.

The Court: Let's look at that book, Rule 31. I am pretty sure that a jury's verdict can be received on Sunday.

Mr. Reich: I don't think it is mentioned specifically.

The Court: I can't see any objection whatever to the jury deliberating on Sunday. Do you know of any?

[fol. 345a] Mr. McLaughlin: I don't know of any. I have never even heard of it, to tell you the truth; in my experience it has never occurred.

The Court: I wonder if there is anything under Title 28 on holidays.

Mr. Morphy: Your Honor, to make the record exactly right, I have a note of when I was talking to the doctor of just what he said. I talked to him at 9:55 this morning, A. M., and he gave me, "Psychiatric overlay, anxiety overlay and depression." And he stated that he would be back at seven o'clock, after dinner.

The Court: This is the testimony of Deputy Marshal Morphy.

Mr. Morphy: These were notes taken from the doctor in my office.

The Court: All right.

Mr. Morphy: Thank you.

The Bailiff: Pardon me, Judge.

The Court: What is it, sir?

(A note was handed to the Court by the Bailiff.)

The Court: This is a statement addressed to me: "I am sorry to inform you that the jury has not been able to reach a verdict. We are deadlocked without any hope, we believe, of any change and feel it useless to deliberate any further. I am not familiar with procedure, but since the majority of the jurors feel that a meeting of the foreman with you might be helpful, I am making such a request."

We can't have a meeting with the foreman, but if they want a meeting, they could all come into court, but I don't know what would be accomplished by that. So, I think we will just tell them we got their message and tell them to keep on working.

Are there any further suggestions from anyone?

[fol. 346a] Mr. McLaughlin: Well, we have already moved for a mistrial.

The Court: Tell them I have got their message and I suggest they keep on working.

The Bailiff: All right.

Mr. McLaughlin: Your Honor, I don't know what the technicalities of it are, but if they are going around and if they are going to be kept together, they may as well deliberate on Sunday as not.

The Court: I am in favor of it. I think it is perfectly proper.

Mr. McLaughlin: I don't see what can be gained by keeping them cooped up.

The Court: I will take a verdict on Sunday, and rather to keep them cooped up, they might as well deliberate.

Mr. McLaughlin: As far as that goes, I have already moved that they be discharged. Since that is denied, if they have to work on Sunday, they have to work on Sunday. I don't think there is anything wrong with that.

The Court: In the event of a verdict, would you stipulate it might be received on Sunday?

Mr. McLaughlin: We may as well get it on Sunday as keeping them sitting around waiting for them to hand it in on Monday.

The Court: That is what I mean. I don't see any reason for them sitting around, and I don't think there is any.

That is about all we can accomplish, isn't it, now? That will be all for the time being and we will be in recess awaiting the pleasure of the jury or until further notice.

Mr. McLaughlin: Thank you, your Honor.

The Court: Let the record show the presence of defendant with counsel throughout this proceeding.

(Whereupon, at 3:15 p. m., a recess was taken.)

[fol. 347a] (At 8:20 p. m., Saturday, March 7, 1964, the Court met with counsel in chambers and had an off-the-record discussion, during which it was announced the jury had reached a verdict.)

VERDICT

Saturday, March 7, 1964, 8:20 P. M.

* * * * * * *

The Court: In the case of the United States of America, Plaintiff, versus Anthony M. Grosso, ladies and gentlemen of the jury, have you arrived at a verdict?

The Foreman: We have, your Honor.

The Court: Will you please pass it to the bailiff?

(The verdict was handed to the bailiff.)

The Court: The clerk will read the verdict.

The Clerk: Members of the jury empaneled in the case of United States of America, Plaintiff, against Anthony M. Grosso, Defendant, at Criminal No. 62-281, and now; to-wit, March 7, 1964, we the jury empaneled in the above-[fol. 348a] entitled case find the Defendant Anthony M. Grosso is guilty of the charge contained in count 1 of the indictment; and

We find the Defendant Anthony M. Grosso is guilty of the charge contained in count 2 of the indictment; and

We find the Defendant Anthony M. Grosso is guilty of the charge contained in count 3 of the indictment; and

We find the Defendant Anthony M. Grosso is guilty of the charge contained in count 4 of the indictment; and

We find the Defendant Anthony M. Grosso not guilty of the charge contained in count 5 of the indictment; and

We find the Defendant Anthony M. Grosso is guilty of the charge contained in count 6 of the indictment; and

We find the Defendant Anthony M. Grosso is guilty of the charge contained in count 7 of the indictment; and

We find the Defendant Anthony M. Grosso is guilty of the charge contained in count 8 of the indictment.

So say you all.

And we find the Defendant Anthony M. Grosso is guilty of the charge contained in count 9 of the indictment; and

We find the Defendant Anthony M. Grosso is guilty of the charge contained in count 10 of the indictment; and

We find the Defendant Anthony M. Grosso is guilty of the charge contained in count 11 of the indictment; and

We find the Defendant Anthony M. Grosso is guilty of the charge contained in count 12 of the indictment; and

We find the Defendant Anthony M. Grosso is guilty of the charge contained in count 13 of the indictment; and

We find the Defendant Anthony M. Grosso is guilty of the charge contained in count 14 of the indictment; and

We find the Defendant Anthony M. Grosso is guilty of the charge contained in count 15 of the indictment; and [fol. 349a]. We find the Defendant Anthony M. Grosso is guilty of the charge contained in count 16 of the indictment; and

We find the Defendant Anthony M. Grosso is guilty of the charge contained in count 17 of the indictment; and

We find the Defendant Anthony M. Grosso is guilty of the charge contained in count 20 of the indictment; and

We find the Defendant Anthony M. Grosso is guilty of the charge contained in count 21 of the indictment; and

We find the Defendant Anthony M. Grosso is guilty of the charge contained in count 22 of the indictment; and

We find the Defendant Anthony M. Grosso is guilty of the charge contained in count 23 of the indictment.

So say you all.

The Court: Does counsel desire to have the jury polled?

Mr. McLaughlin: Yes, your Honor.

The Clerk: Viola M. Hanam, would you please stand?

Viola M. Hanam, juror No. 1, is the verdict as read your verdict?

Juror No. 1: Yes, it is.

The Clerk: Please be seated.

Juror No. 2, Margie M. Hartdung, would you please stand?

Margie M. Hartdung, is the verdict as read your verdict?

Juror No. 2: It is.

The Clerk: Please be seated.

Juror No. 3, Frances D. McKahan.

Frances D. McKahan, is the verdict as read your verdict?

Juror No. 3: Yes.

The Clerk: Please be seated.

Juror No. 4, King R. Nye.

[fol. 350a] King R. Nye, is the verdict as read your verdict?

Juror No. 4: Yes.

The Clerk: Please be seated.

Juror No. 5, Steve Baker.

Steve Baker, is the verdict as read your verdict?

Juror No. 5: Yes, it is.

The Clerk: Be seated, please.

Juror No. 6, Alberta Barbara Karlosky.

Alberta Barbara Karlosky, is the verdict as read your verdict?

Juror No. 6: Yes, sir.

The Clerk: Please be seated.

Juror No. 7, Alice Marian Eiler.

Alice Marian Eiler, is the verdict as read your verdict?

Juror No. 7: Yes, it is, sir.

The Clerk: Please be seated.

Juror No. 8, James P. Santello.

James P. Santello, is the verdict as read your verdict?

Juror No. 8: Yes.

The Clerk: Please be seated.

Juror No. 9, Benjamin T. Hopkins.

Benjamin T. Hopkins, is the verdict as read your verdict?

Juror No. 9: Yes, sir, it is.

The Clerk: Please be seated.

Juror No. 10, Gerard R. Miller.

Juror No. 10: Yes, it is.

The Clerk: Juror No. 10, Gerard R. Miller, is the verdict as read your verdict?

Juror No. 10: Yes.

The Clerk: Please be seated, sir.

Juror No. 11, Mary Giammaria.

Mary Giammaria, is the verdict as read your verdict?

Juror No. 11: Yes.

[fol. 351a] The Clerk: Please be seated.

Juror No. 12, Ida J. Tempert.

Ida J. Tempert, is the verdict as read your verdict?

Juror No. 12: Yes, sir.

The Clerk: All polled, your Honor.

The Court: Ladies and gentlemen of the jury, the Court thanks each of you. This has been a difficult case, it has been a long trial, over four weeks now. I noticed throughout the trial you were very attentive, and I am sure that your verdict is a result of careful consideration, and I think the Court and the parties are indebted to you for the consideration that you gave this case.

Now you may be excused, and I think you are to be excused from further duty.

The Clerk: Your Honor, their service has been completed. They will return home and their checks will be sent to them, sir.

The Court: Thank you very much.

The Jurors: Thank you.

The Court: The verdict may be recorded now.

The Clerk: Thank you, sir.

(Jury excused.)

(The Court accepted the verdicts of the jury.)

The Court: The Defendant is remanded to the custody of the marshal, and the Court will fix the time for the imposition of sentence. Let's see, today is Saturday. How about Monday afternoon about 2:00 o'clock?

Mr. Diamond: That would be fine, your Honor.

Mr. McLaughlin: I wonder what arrangements, your Honor, we can make, since this is Saturday night, for bail or bond for this gentleman.

The Court: No, he is going to stay in jail. He is remanded to the custody of the marshal.

[fol. 352a] Mr. McLaughlin: Might I say that this is unusual? I feel it is somewhat unwarranted to commit him to jail on Saturday night.

The Court: Well, he is going to jail.

Mr. McLaughlin: He will be held without bail?

The Court: That is the order of the Court.

The judgment and sentence of this Court will be imposed upon the Defendant on Monday, March 9, 1964, at the hour of 2:00 p. m., in this courtroom and sentence will be imposed on all the counts of which he was found guilty by the jury as set forth in the indictment.

Is there anything further the Court should do at this time?

Mr. McLaughlin: There is one thing—go ahead.

Mr. Diamond: We have nothing further, your Honor.

Mr. McLaughlin: The doctor who examined the juror is here, and since he is here, I would like to get a report from him.

The Court: What do you think about it?

I am not going to bring that up here at this time at all. So we will be in recess now until Monday, March 9, 1964, at 2:00 o'clock in the afternoon.

Mr. Diamond: With reference to the companion case, your Honor had indicated that that case was to commence two full days after the termination of this case. Counsel for the Defendant is here in court, and he has requested that the case be postponed for a week. We would concur in that request for several reasons, and if your Honor will give us that time—

The Court: You will have to get another judge, because I don't want to stay around another week. If you want to try the case in three days, I will try it.

Mr. Diamond: Would Wednesday morning be all right?

The Court: To start the trial?

[fol. 353a] Mr. Diamond: Yes, your Honor.

The Court: All right, to start the trial. Do you have the title of the case? The clerk knows what it is.

Mr. McLaughlin: I am not counsel in it, your Honor.

Mr. Wadden: I am, your Honor.

The Court: Mr. Wadden, yes. We will start, then, Wednesday. Is that three days after today? I guess it is, isn't it?

Mr. Diamond: Yes, your Honor.

The Court: We will start the trial in that case at 10:00 o'clock Wednesday morning with the jury here.

Mr. Diamond: Thank you, your Honor.

The Court: The Defendant is remanded to the custody of the marshal.

(Whereupon, at 9:07 p. m., Saturday, March 7, 1964, court was recessed.)

Certified: A true transcript.

Jack M. LaMotte, Official Reporter.

PROCEEDINGS OF MARCH 10, 1964

ARGUMENTS ON MOTIONS

The Court: Let the record show the presence of the defendant with counsel. I understand you have some motions.

Mr. McLaughlin: He is on his way down, your Honor. The defendant is—

The Court: Oh, I thought he was here.

[fol. 354a] Mr. McLaughlin: He is on his way down.

The Court: Oh, pardon me.

(The defendant was brought into the courtroom.)

Mr. McLaughlin: The defendant is present now, your Honor, and I will proceed.

The Court: Let the record show the presence of the defendant. Is he here?

Mr. McLaughlin: Yes, sir.

The Court: Let the record show the presence of the defendant with counsel. You may proceed, sir.

Mr. McLaughlin: Thank you. I have several motions, your Honor. Before I proceed to them, there are two things I would like to inquire of so that the record is clear.

It is my understanding from listening to the sentence yesterday that the sentence was passed without a pre-sentence report. In other words, the pre-sentence investigation.

The Court: I didn't ask for one.

Mr. McLaughlin: I just wondered about that.

The Court: I heard that during the trial.

Mr. McLaughlin: And, secondly, it was my understanding yesterday when I made my motion for bail that your Honor did not care to have a hearing on it.

The Court: I denied bail, yes.

Mr. McLaughlin: That is right. I just wanted to make that clear.

The Court: Yes.

Mr. McLaughlin: Now, I have two motions here today, your Honor. In accordance with the rules, I had made a motion for judgment of acquittal at the close of the Government's evidence, and it was denied. I had made a motion—

The Court: I couldn't hear what you said. You made [fol. 355a] a motion for acquittal at the close of the government's evidence?

Mr. McLaughlin: Yes, and it was denied.

The Court: This motion has been denied?

Mr. McLaughlin: That is right.

The Court: Yes.

Mr. McLaughlin: And, I don't like to beat a dead horse or take the time of the Court on something that we have already argued. This would be the third time. And, it is identical in every respect to the motion that we argued once for two days and once for the greater part of an afternoon.

The Court: Yes. That is this motion.

Mr. McLaughlin: The motion for judgment of acquittal.

The Court: And this was filed today, March 10, 1964. It is the same motion in substance?

Mr. McLaughlin: It is identical to the one that we argued twice before. So, I don't see any point in taking the time of the Court to re-argue something that we argued twice before. I am filing it in accordance with the rules because, after—

The Court: You don't propose to argue it any further. I wonder if counsel for the government wants to have anything to say about it?

Mr. Diamond: No, your Honor.

Mr. McLaughlin: I think I said everything about it.

The Court: All right. The same ruling. The motion for judgment of acquittal at the close of the evidence filed March 10, 1964 is denied in all respects.

Mr. McLaughlin: I think, if I am not mistaken, there is probably a mistake in the caption of that motion. It shouldn't read "At the close of the government's evidence". It is identical to that motion. It should read "At the close [fol. 356a] of the case". I will correct it on the original on your Honor's copy.

The Court: "At the close of all of the evidence"?

Mr. McLaughlin: "At the close of all of the evidence", it should be.

The Court: So, that may be corrected by interlineation.

Mr. McLaughlin: Yes, your Honor.

The Court: How do you want it corrected? It would be a motion for judgment of acquittal—

Mr. McLaughlin: "After verdict".

The Court: "After verdict." Yes. That will do it.

(The corrections were made on the papers.)

Mr. McLaughlin: That will set that straight.

The Court: All right. And, that has been denied. The motion for judgment of acquittal after verdict has been denied.

* * * * * * *

[fol. 364a] Mr. McLaughlin: * * * The only other matters that have not been raised—or actually I think they have been raised—is the matter, and I am sure your Honor is [fol. 365a] aware, that once this juror got ill, I made several motions for a mistrial on the basis that—

The Court: There is one thing I noticed from looking over this. You made a point that there was a communication received of which you were not informed and of which the defendant was not informed. There was a communication which stated that the jury could not agree. That is all they said, and that is obvious. If they could agree, they would have been in court. Any time a jury is out, they haven't agreed.

Mr. McLaughlin: I was going to get to that.

The Court: So, if that wasn't shown to you, it was just a mere oversight. I have had another one later on. I had two. One was almost identical or to the same effect, that they couldn't agree.

Mr. McLaughlin: I was present when the second one came in.

The Court: But, the other one was at least in substance the same. If it wasn't given to you, it was merely inadvertence. But, it would only inform you what you already knew, that the jury had not agreed.

Mr. McLaughlin: I guess both the communications, I suppose that the clerk had those now, I guess.

The Court: I don't know whether he has them.

Mr. McLaughlin: The second one, as I recall, you read into the record.

The Court: I don't remember. But, I know what it said, that they couldn't agree. That is all.

Mr. McLaughlin: You are aware, of course, that I made several motions for mistrial at that point, after the juror had become ill, on the basis that the jury already having given notice that they couldn't agree, and then giving a second notice that it couldn't agree, and with the informa-[fol. 366a] tion received from the doctor that one of the jurors was suffering from nervous prostration and was in a

state of mental depression, that in our view the requirement that the jury stay together, and keeping the jury together until Saturday night, actually constituted coercing the jury into bringing forth some kind of a verdict.

And, it is our view of it that the verdict that was brought forth was from a jury which was composed of one person who was mentally and physically incompetent to serve as a juror.

The Court: It is a strange thing—it seems odd—I don't know what it means, and I didn't mean to imply anything at all. We had four alternates sitting here during the whole trial, for four weeks, and everybody was healthy. Nothing wrong with their nerves until those alternates were all dismissed.

Mr. McLaughlin: Well, we wouldn't have had any problems if somebody had gotten sick the day before.

The Court: No. They were perfectly healthy and showed no signs of any nervous depression or any other ailment until the alternates were gone.

Mr. McLaughlin: Well, the doctor indicated, I believe, that some people just can't stand tension. And, apparently, there must have been some split in opinion at some time, because they were out for quite a while. And, apparently, there was some tension.

The Court: Well, don't you think that on any jury there might be a minority. Of course, there must be a minority if they can't agree, either one to eleven or six to six, some for conviction and some for acquittal. It might get down to where there is only one or two, either standing out against an acquittal or standing out against conviction. And, of course, they listen to the arguments and arguments [fol. 367a] and arguments, and I suppose they get a little bit angry at times too.

Mr. McLaughlin: I would imagine so. I have never been on a jury.

The Court: Well, I have heard people talk about them.

Mr. McLaughlin: Yes, I have too.

The Court: They have some angry times. They get put out at one another. And, finally, they apologize to one another and make up, and then sit down and come to a verdict. So, that is nothing unusual. And, a person is bound, after a trial of five weeks nearly, and sitting in there, if she was one of a minority or the only one of a minority—I don't know which it was—but if she was, there must have been some argument and discussion. And, it could be wearing and tearing of her nerves. That is natural.

Mr. McLaughlin: Well, it is our contention that in view of the doctor's report, if it was wearing and tearing it was tearing to the extent that the woman had to be confined to bed from Thursday evening at, I think, maybe 11 o'clock or something like that, or 11:30, through Saturday until around noon.

The Court: Well, I think everything that could have been done was done by the marshals and those in charge of the jury, the deputy marshals. The doctor seemed to be very attentive and efficient as far as I know. She had an opportunity for rest. There was nothing to show here that when she returned to the jury room she did so under any protest that she wouldn't be able to proceed. The doctor thought she could go ahead. And, I would think she thought so too or she would have told the marshals to that effect. I don't think anybody would compel a person to get out of a sick bed and go down into a room and deliberate over something of this nature, or of any nature.

[fol. 368a] Mr. McLaughlin: Well, it is indicated by the record, your Honor, I think Mr. Morphy told us that when they came back on Saturday, he asked her how she was, and she could walk under her own power, but she said she was weak.

The Court: Sure. She would be weak.

Mr. McLaughlin: And, it is our contention that such a person—of course, when the jury is confined like that—

The Court: Well, that certainly isn't enough to cause me to sustain a motion for a new trial. And, I wouldn't sustain

a motion for a new trial for the fact that Juror No. 5 might be a constable.

Mr. McLaughlin: There is no question that he is a constable.

The Court: I don't know. I don't dispute you.

Mr. McLaughlin: We have checked it.

The Court: I will say that you are honestly stating that you think he was, anyway. It is not a question of your integrity.

Mr. McLaughlin: Actually, I believe, your Honor, you will find that most of the other motions or reasons suggested in the new trial motion all deal with points of evidence that we argued during the trial. And, as I said, I don't see any necessity for taking up all the time in rearguing something that we argued for five full weeks.

The Court: I would like to hear from counsel for the Government as to their views as to whether or not—I assume the counsel for Government have studied and looked over the motions. And, if they have any idea that it is very likely that a new trial should be ordered, I would like to know something about it.

Mr. Diamond: This was handed to me at five minutes till two o'clock—

[fol. 369a] The Court: I would rather find out now rather than find out later on from the Court of Appeals. If we have got some fatal weakness in here, I would appreciate knowing it now.

Mr. Diamond: This motion was handed to me at five minutes to two, and I have hastily looked over it. I see no basis in this motion that would support the granting of a new trial.

As Mr. McLaughlin has indicated, most of what is contained in here has already been argued except for these matters which occurred subsequent to the retiring of the jury for deliberation.

The Court: I can't think of anything myself that would cause me to worry about that. I don't know. I don't see it.

So, are you through?

Mr. McLaughlin: Yes, sir.

The Court: The motion for a new trial is denied in all respects. Is there any other matters to come before the Court now?

Mr. McLaughlin: I don't think so.

Mr. Diamond: We have nothing further, your Honor.

The Court: So, the defendant is remanded to the custody of the Marshal for carrying out the judgment of the Court.

Mr. McLaughlin: I wonder if—of course, these orders all go in the record, but I wonder if I could have a written order denying bail?

The Court: It is in the record that it is denied. I won't grant it.

Mr. McLaughlin: Well, that is what I mean. I wonder if I could—

The Court: It is a matter that the Court of Appeals [fol. 370a] might take a more favorable view of than I do. But, I won't grant bail.

Mr. McLaughlin: Well, that is what I mean. I wonder if—

The Court: Under the circumstances shown in this case, no.

Mr. McLaughlin: I wonder if I could get an order to that effect?

The Court: No. It is in the record. If there is a motion to grant bail, it is denied. And, all the motions now pending have been decided.

Mr. McLaughlin: That is right.

The Court: The motion for a new trial is denied and the motion for acquittal filed March 10, 1964 is denied in all respects, and all the grounds urged are rejected. The motion for a new trial filed March 10, 1964 is denied in all respects and all the grounds urged are rejected by the Court.

So, the defendant is remanded to the custody of the Marshal for carrying out the judgment of the Court. If

there is nothing further to come before the Court, Court will be in recess until tomorrow morning at 10:00 o'clock.

(Whereupon the Court recessed.)

Certified:

A True Transcript:

B. D. Cook, Official Reporter.

CARL—ENDS 6

[fol. 371a]

IN UNITED STATES DISTRICT COURT

MOTION FOR JUDGMENT OF ACQUITTAL AFTER VERDICT—
Filed March 10, 1964

And Now comes the defendant, Anthony M. Grosso, by his Attorney, James E. McLaughlin, Esquire, and renews his Motions for Judgment of Acquittal as to all counts of the Indictment previously filed at the close of the Government's case and at the close of all the evidence, for the reason that such evidence is insufficient as a matter of law to sustain a conviction. Specific grounds which relate to the respective counts are set forth hereinafter.

The grounds which relate to Count One of the Indictment are as follows:

1. The Government has failed to prove there is a tax liability due and owing and thus has failed to prove the essential intent to defraud.
2. The inadmissibility of Government Exhibit One renders the evidence on this Count insufficient.
3. The Government's proof shows that the defendant has been charged under the wrong provision of 26 U. S. C. Sec. 4401.
4. The Government has failed to prove defendant could have paid the excise tax without risk of self-incrimination in violation of his Fifth Amendment rights.

5. The Government has failed to prove the conspiracy alleged in Count One in that it has failed to prove the purpose of the alleged conspiracy was to defraud the United States; and in that its proof tends to show multiple conspiracies rather than the single conspiracy alleged.

[fol. 372a] The grounds which relate to Count Two of the Indictment are as follows:

1. The Government has offered no proof of excise tax liability for this period covered by this Count.
2. The Government has failed to prove that there is a tax liability due and owing by the defendant on this Count, because it has not shown whether the excise tax was paid by the writers or branch managers.
3. The Government has failed to prove the alleged excise tax liability has not been paid by the defendant's alleged partners.
4. The inadmissibility of Government's Exhibit One renders the evidence on this Count insufficient.
5. The Government's proof shows that the defendant has been charged under the wrong provision of 26 U. S. C. Sec. 4401.
6. The Government has failed to prove defendant could have paid the excise tax without risk of self-incrimination in violation of his Fifth Amendment rights.
7. The Government's proof shows a different partnership from that alleged in the Indictment.

The grounds which relate to Counts Three through Fifteen are the same as the grounds specified with respect to Count Two, with the exception of the ground set forth in Paragraph One of such grounds.

The grounds which relate to Counts Sixteen through Eighteen are the same as the grounds specified with respect to Count Two.

The grounds which relate to Count Twenty of the Indictment are as follows:

[fol. 373a] 1. The Government has failed to offer proof of any amount of excise tax liability for the month to which this Count relates, and accordingly, has failed to establish the occupational tax liability alleged in this Count.

2. The inadmissibility of Government's Exhibit One renders the evidence on this Count insufficient.

3. The Government's own proof establishes that one or more of defendant's alleged partners had an occupational tax stamp during the period covered by this Count, and thus negates defendant's liability for the occupational stamp alleged in this Count.

4. The Government's proof shows that the defendant has been charged under the wrong provision of 26 U. S. C. Sec. 4401, and thus has been erroneously charged under Sec. 4411.

Counts Twenty-One and Twenty-Two of the Indictment are the same as the grounds specified with respect to Count Twenty, with the exception of the grounds set forth in Paragraph One of such counts.

The counts which relate to Count Twenty-Three of the Indictment are the same as the grounds specified with respect to Count Twenty.

James E. McLaughlin, Esquire, Atty. for Deft.—
Anthony M. Grosso.

Submitted: March 10, 1964.

[fol. 374a]

IN UNITED STATES DISTRICT COURT

MOTION FOR NEW TRIAL—Filed March 10, 1964

Comes Now the defendant, by his attorney, James E. McLaughlin, and moves, pursuant to Rules 29(b) and 33 of the Federal Rules of Criminal Procedure, that in the event his motion for judgment of acquittal be denied as to any count or counts, a new trial be granted as to such count or counts.

The grounds for this motion in the alternative for a new trial are as follows (unless otherwise indicated, each ground applies to each count on which defendant was found guilty, namely, counts 1 through 4, 6 through 17, and 20 through 23).

1. All grounds asserted in the motions for judgment of acquittal made or renewed at the close of the government's case, at the close of all the evidence, and after discharge of the jury.

2. The court erred in denying defendant's motions for judgment of acquittal made or renewed at the close of the government's case, at the close of all the evidence and after discharge of the jury.

3. The verdict is contrary to the weight of the evidence.

4. The verdict is not supported by substantial evidence.

5. The court erred in charging the jury and in refusing to charge the jury as requested.

6. The verdict of not guilty on count 5 establishes that the jury found this defendant entitled to credit for excise tax paid by the co-defendant and alleged co-partner, Joseph Pino, during March of 1959. The undisputed evi-
[fol. 375a] dence introduced by the government established that the amount of such excise tax payment by Pino was $25,000.00. The excess of this payment over the amount proven to be due and owing for the period covered by

count 5 should have been credited against the tax liability found due and owing for the periods covered by other counts. The verdict of guilty on all other counts demonstrates that such credit was not given.

7. The verdict of guilty on each of counts 20, 21, 22 and 23 is inconsistent with the verdict of guilty on the excise tax counts (counts 2 through 4 and 6 through 17). The verdict on the excise tax counts shows that the jury found the existence of a partnership, as alleged; but such partnership was required to pay only one special wagering occupational tax, under 26 U. S. C. § 4902. Since the government's undisputed evidence showed the payment of wagering occupational tax by this defendant's alleged partners, this defendant was not liable for the tax as charged.

8. The court erred in denying defendant's motion for mistrial on March 6, 1964. A supporting affidavit of James E. McLaughlin shows factual bases for this ground on the motion, supplementing those which already appear upon the record.

9. The court erred in denying defendant's motions for mistrial on March 7, 1964. A supporting affidavit of James E. McLaughlin shows factual bases for this ground of the motion, supplementing those which already appear upon the record.

10. The court erred in requiring the jury to continue deliberations from the afternoon of March 4 until the night of March 7, notwithstanding the jury's having twice re-
[fol. 376a] ported a hopeless deadlock, and notwithstanding that two of the jurors became ill and at least one of them was in a physical and mental condition where she could not properly discharge the functions of a juror. A supporting affidavit of James E. McLaughlin shows factual bases for this ground of the motion, supplementing those which already appear upon the record.

11. Irregularities and improprieties occurred between the time of the jury's retiring to consider its verdict on

March 4 and the rendition of its verdict on March 7. A supporting affidavit of James E. McLaughlin shows factual bases for this ground of the motion, supplementing those which already appear upon the record.

12. None of the proceedings on March 5 was recorded by the court reporter, as required by law. Certain of the proceedings on March 4 (subsequent to the jury's retiring to consider its verdict), March 6 and March 7, were also not recorded by the court reporter, as required by law. A supporting affidavit of James E. McLaughlin shows factual bases for this ground of the motion, supplementing those which already appear upon the record.

13. Certain of the proceedings between March 4 and March 7 were held in the absence of defendant and his counsel, who were lawfully entitled to be present. A supporting affidavit of James E. McLaughlin shows factual bases for this ground of the motion, supplementing those which already appear upon the record.

14. The court erred in refusing to take testimony, on the night of March 7, from the doctor who had examined and treated one of the jurors on March 5, March 6, and March 7. A supporting affidavit of James E. McLaughlin [fol. 377a] shows factual bases for this ground of the motion, supplementing those which already appear upon the record.

15. One of the jurors, Steve Baker, was and is a law enforcement officer of the State of Pennsylvania, namely a constable in Belle Vernon, Pa. This fact was concealed from defendant and his counsel by Mr. Baker's statement as to his occupation and employment on the *voir dire* (February 3 transcript of proceedings, p. 56). Had Mr. Baker's status as a constable been revealed, defendant would have had a basis to challenge Mr. Baker for cause; had such challenge for cause been denied, defendant would have exercised a peremptory challenge to exclude Mr. Baker from the jury. A supporting affidavit of Frederick

G. Koerner shows the factual basis for this ground on the motion.

16. On the night of March 9, 1964, Cresson Davis, Chief of Intelligence for the Internal Revenue Service in this district, publicly stated on a television broadcast that a purpose and effect of the wagering tax laws under which defendant was convicted and sentenced was to tip off local law enforcement authorities as to unlawful gambling activities. This statement of Mr. Davis is in conflict with the position represented to the court by the government and by witnesses from the Internal Revenue Service. It constitutes newly discovered evidence, not previously available to the defense, showing that compliance with the wagering excise tax statutes may not be compelled without infringement of Fifth Amendment guarantees.

17. The Court erred in granting the government's motion to reopen its case after the defendant's motion for judgment of acquittal at the close of the government's case [fol. 378a] and the argument thereon had demonstrated the failure to prove an essential element of its case.

18. The court erred in denying defendant's motion for mistrial on the basis of prejudicial newspaper material.

19. The Court erred in denying defendant's motion for mistrial on the basis of the erroneous admission of witness Flynn's testimony as to an alleged prior statement by the witness Sunner, which had not been testified to by the witness Sunner, and was highly prejudicial.

20. The court erred in sending the court's instructions to the jury, over defendant's objections.

21. The court erred in sustaining objections to and excluding the testimony and proffered testimony of defendant's expert witness, John Dwyer.

22. The court erred in ruling that the defense was not entitled to a hearing, outside the presence of the jury, at

which it might seek to demonstrate that the witness Hamilton had been utilized by some agent or agents of the government to obtain information pertinent to the defense, to interfere with defendant's Sixth Amendment right to assistance of counsel, and at the behest of a government agent or agents to communicate directly with the defendant although the government knew that such defendant was under indictment and represented by counsel.

23. The court erred in admitting government's exhibits 76 and 77 (notebooks seized at the so-called Bethel Park raid) and other fruits of the unlawful search and seizure at the Betz premises in Bethel Park on March 25, 1961, which were the subject of Paragraph 25 of the defendants' [fol. 379a] motion for suppression and return of evidence, and which the government had represented to the court and to defense counsel that it would not introduce in evidence.

24. The court erred in admitting government's exhibit 1 (the record book kept by Harold Hannon) and other fruits of the unlawful search and seizure of the Hannon premises on April 27, 1960. The search and seizure was the subject of Paragraph 21 of defendants' pre-trial motion for suppression and return of evidence, and of renewed motions to suppress at trial on the basis of the augmented record available, showing that the search and seizure were in violation of 18 U. S. C. § 3109, and of the Fourth Amendment of the United States Constitution.

25. The court erred in admitting government's exhibits 8, 9 and 10 (the two notebooks and a package of papers seized at Oakland) and other fruits of the unlawful search and seizure at Oakland on April 20, 1959, which were the subject of Paragraph 10 of defendants' motion for suppression and return of evidence.

26. The court erred in admitting government's exhibit 11 (box of numbers slips seized at Calvary Cemetery) and other fruits of the unlawful search and seizure at Calvary

Cemetery on November 27, 1959, which were the subject of Paragraph 15 of defendants' motion for suppression and return of evidence.

27. The court erred in admitting government's exhibit 50.

28. The Court erred in admitting government's exhibit 52.

29. The court erred in admitting government's exhibit 54.

[fol. 380a] 30. The court erred in failing to permit defense counsel to examine all of the grand jury testimony of the witness Sunner.

31. The court erred in charging the jury in Instruction No. 31 and No. 32.

32. The court erred in failing to charge the jury as reflected by defendant's refused instructions filed of record.

33. The court erred in accepting a communication from the jury on March 5, 1964 in the absence of the defendant or his counsel and in replying thereto without informing defendant's counsel of the exact context of the message or making same a part of the record.

34. The court erred in permitting an unsupervised separation of the jury after they had begun their deliberations.

35. The court erred in ordering the jury to be confined from 11:30 P. M., March 5, 1964 until approximately 2:30 P. M., March 7, 1964 when it knew or should have known that one of the jurors was suffering from nervous prostration, mental depression and was in such poor health as to render the juror unfit for jury service and deliberation.

36. The court erred in permitting the jury to reach a verdict before securing a medical opinion as to the fitness of the juror who was ill.

37. The court erred in refusing the jury's request for discharge because of their hopeless deadlock on Saturday, March 7, 1964, at approximately 3:10 P. M. in view of the reports relative to the physical condition of one of the jurors.

[fol. 381a] 38. The court erred in failing to make a record of the treatment and diagnosis of the court appointed physician who attended the sick juror.

39. *In support of this motion*, defendant hereby reasserts all objections and motions made at trial and during the pre-trial proceedings upon which the court ruled adversely to defendant.

Respectfully submitted,

James E. McLaughlin, Esquire, Atty. of Deft.—Anthony M. Grosso.

AFFIDAVIT IN SUPPORT OF MOTION FOR NEW TRIAL

Before me the undersigned authority appeared James E. McLaughlin, Esquire, who being duly sworn, deposes and says:

The issues in this case were submitted to the jury on Wednesday, March 4, 1964 at approximately 4:15 P. M. Deliberation continued that day until approximately 11:00 P. M. at which time the jury was taken to a hotel.

Thursday, March 5, 1964 the jury resumed deliberation. At approximately 12:15 P. M. Thursday afternoon, counsel for the defendant was informed by the U. S. Attorney that at approximately 11:30 A. M. the jury had sent a note to the judge indicating they could not agree. The U. S. Attorney further informed defense counsel that the court had, at that point instructed the jury, through the bailiff to continue deliberating. Neither the defendant nor his attorney were present when this communication was received by the court, nor were they when the court made

[fol. 382a] its reply to the jury. This communication from the jury was never made a part of the record.

At 10:50 P. M. Thursday, March 5, 1964 the attorney for the defendant was notified by the U. S. Attorney that a juror had been taken ill as she was being escorted from the building and required medical attention which was then being sought. The U. S. Attorney then suggested that defense counsel contact the trial judge at his hotel, which was immediately done. Upon contacting the court, I informed the court I would not oppose necessary medical attention for the sick juror and indeed, felt that I could not morally or ethically permit her to go without necessary medical attention. Within ten minutes the trial judge again contacted me and informed me that a second juror had become ill. I immediately left for the courthouse and arrived within ten minutes. Upon arrival, I was informed by the U. S. Attorney that a doctor had been procured by one William Claney Smith, Assistant District Attorney of Allegheny County after a number of unsuccessful attempts on the part of Federal personnel.

The doctor arrived sometime after 11:30 P. M. that night and examined the two sick jurors, both of whom were women. The record discloses that during the period of initial illness and medical examination these two women jurors were separated from the rest of the jury for a period of forty-five minutes to one hour. At the conclusion of the examination, the doctor gave a report by telephone to the trial judge in the presence of the U. S. Attorney and myself. The gist of the report was that one juror felt better and the second juror was suffering from nervous disorder which would probably be improved by rest.

[fol. 383a] *Friday, March 6, 1964:*

At approximately 10:30 A. M. the court received a report from the doctor which was relayed to counsel in their presence. The report indicated that the sick juror was suffering from neuro-circulatory-asthenia. Subsequent to some discussion which was not recorded in the record, de-

fense counsel moved for a mistrial at approximately 11:45 A. M. The proceeding in the latter respect are a part of the record. The jury did not deliberate at all on this day and were kept confined to their hotel.

Saturday, March 7, 1964:

On Saturday morning at approximately 11:30 A. M. all counsel conferred with this court, which conference was not put on the record. At this conference defense counsel was informed by the court that the woman juror who was ill was still unable to resume deliberation, but that the jury would be brought back for deliberation at approximately 2:00 P. M. The jury returned at approximately 2:50 P. M., whereupon counsel for defendant and the Government had a conference which was made a part of the record.

The jury continued to deliberate without being taken out for dinner (box-lunches were sent in to them) until approximately 8:30 P. M. when they arrived at a verdict. Prior to the jury signifying a verdict, counsel and the court met at 8:20 P. M. for a conference which was not made a part of the record. At this conference the Government again indicated its desire to have the court give the "Allen" charge. Counsel for defendant objected until the court's physician completed his examination of the ill juror and until the results of such examination were made a part of [fol. 384a] the record. The court agreed and while waiting for the arrival of the doctor the verdict came in and was accepted by the court. The physician examined the juror after the guilty verdict was rendered, the jury polled and the jury was discharged. After the court had entered judgment and while the doctor was still available the record discloses that counsel for defendant requested the opportunity to secure a report from him, this request was denied by the court.

The jurors were confined to their quarters from late in the evening March 5, 1964 to approximately 2:45 P. M.

March 7, 1964 because of the illness of a juror. During that period the only detailed report of the juror's condition which was made a part of the record was a report placed on the record by defense counsel after consultation with the court, on Government appointed physician. Counsel for defendant was informed that the juror was medicated by the physician, but the extent and type of medication are presently unknown.

The statements made by the deponent in chambers reported in the transcript of proceedings held in the judge's chambers on March 6 and 7, 1964 are hereby adopted and made a part of this affidavit.

James E. McLaughlin

Sworn to and subscribed before me this ..... day of ....., 1964.

....., Notary Public.

[fol. 385a]

IN UNITED STATES DISTRICT COURT

ORDER OF COURT—Filed March 11, 1964

Counsel for defendant filed a Motion for New Trial on March 10 which Motion made reference to a supporting affidavit of counsel which had not yet been filed. The supporting affidavit was submitted to the court on March 11, 1964, and it is hereby Ordered that it be filed and made a part of the record on the Motion for New Trial. The submission and consideration of the affidavit in no way alters the decision of the Court that the Motion for New Trial should be and is denied in all respects.

Rodger T. Foley, District Judge.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed March 10, 1964

Name and address of appellant:

Anthony M. Grosso, 840 Ridgeview Drive, Pgh. Pa.

Name and address of appellant's attorney:

James E. McLaughlin, Esquire, 606 Frick Bldg., Pittsburgh, Pennsylvania.

Offense:

18 U. S. C. § 371 (count 1); 26 U. S. C. § 4401 and 7203 (counts 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17); 26 U. S. C. § 4411 and 7203 (counts 20, 21, 22, 23).

[fol. 386a] Concise statement of judgment or order, giving date, and any sentence:

Judgment of conviction entered March 9, 1964, upon counts 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 20, 21, 22, 23 of indictment No. 62-281.

Sentence: on count 1, one year's imprisonment and $1000.00 fine. On each of the remaining counts, one year's imprisonment and $10,000.00 fine. The terms of imprisonment on counts 4, 6, 8, 9, 10, 11, 12, 13, 15, 16, 17 are to run concurrently with the term of imprisonment imposed for violation of count 2. The terms of imprisonment on counts 1, 2, 3, 7, 14, 20, 21, 22, 23 are consecutive.

The appeal is also from the order of March 10, 1964, denying defendant's motions for acquittal or new trial.

Name of institution where now confined, if not on bail:
Allegheny County Jail.

The above-named appellant hereby appeals to the United States Court of Appeals for the Third Circuit from the above-stated judgment.

Dated: March 10, 1964.

James E. McLaughlin, Esq., Attorney for Appellant,
606 Frick Bldg., Pittsburgh, Pa.

[fol. 387]

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14810

UNITED STATES OF AMERICA,

v.

ANTHONY M. GROSSO, Appellant.

Appeal from the Order of the United States Court for the Western District of Pennsylvania at No. 62-281 Criminal.

APPELLEE'S APPENDIX—Filed March 11, 1965

* * * * * * *

[fol. 388] Excerpts From Transcript of Testimony

* * * * * * *

[fol. 389] MR. W. DEAN STRUBLE, called as a witness by the Government, being first duly sworn, was examined and testified on his oath as follows:

Direct examination.

By Mr. Reich:

Q. Mr. Struble, would you state your name and your occupation?

A. W. Dean Struble, technical advisor to the District Director of Internal Revenue, Pittsburgh, Pennsylvania.

Q. How long have you been employed by the Internal Revenue Service?

A. Over twenty-three years.

Q. And, what are the nature of your duties?

A. The investigation, assessment and collection of delinquent federal taxes.

[fol. 390] Q. And are you here today as a representative of the District Director of Internal Revenue for this District?

A. I am, sir.

Q. And does the District Director of Internal Revenue for this District have custody of Internal Revenue records which pertain to the payment of taxes in this District?

A. Yes, sir, we have.

Q. What is the geographical area covered by this Internal Revenue District?

A. The western half of the State of Pennsylvania.

Q. And does that include Allegheny County?

A. Yes, sir.

Q. Would you explain to the jury what is a Form 11-C?

A. A Form 11-C serves two purposes. The first is an application for registry for a wagering tax stamp. After the application is properly filed and the tax paid, at that time the Form 11-C becomes a special tax return. So it has two purposes.

Q. And what tax does it pertain to?

A. It pertains to the wagering tax.

Q. Is that what is popularly known as the gambler's stamp?

A. Yes, sir.

Q. And how much tax payment is required for obtaining the gambling stamp?

A. If it is for a full fiscal year, it is $50.

Q. And you mentioned "fiscal year." What is the period of time covered by the stamp?

A. It is the same as the federal government's fiscal year, July 1st of one year until June 30 of the following year.

[fol. 391] Q. Now, Mr. Struble, does any part of the 11-C become available to the general public?

A. No, sir.

The Court: I didn't catch that. Will you read that.

(The last question and answer were read.)

By Mr. Reich:

Q. Is there any procedure by which any of the information on the 11-C becomes available to the general public?

A. Well, at the time the Form 11-C is accepted by the Director's Office, a wagering tax stamp is prepared. It is a five-part snap out assembly, attached on the left-hand side.

And the entire assembly is placed in the typewriter and the name and address that would have appeared on the application form is then typed right onto the stamp, and the stamp itself would then be given to the individual that made the application.

The second copy of that five-part assembly is known as a record-10 and that is the record that is kept in the District Director's Office in an alphabetical file and is a public record. It is maintained there on a fiscal year basis and each fiscal year is kept separately.

Q. And when you say it is a public record, does that mean that any member of the public can gain access to the information on the Record-10?

A. Yes, sir.

Q. Any policeman?

A. Anyone.

[fol. 392] Q. Anyone?

A. Yes, anyone.

The Court: What was that called?

Mr. Reich: A record-10, your Honor.

The Court: A record-10?

The Witness: I might add, sir, that this assembly is so made that in the upper right-hand corner it has a stamp number. And that is the only number of that stamp.

In other words, it is the same as your license number. No one in Pennsylvania has the same license number as you have.

By Mr. Reich:

Q. And no one would have the same stamp number as you have?

A. That is right, sir. And the record-10 form behind, when it is manufactured, has the same number in the upper right-hand corner that appears on the stamp, which is the first part.

Q. Now, Mr. Struble, would you explain to the jury now what is a Form 730?

A. A Form 730 is a treasury form, Internal Revenue Service form, that is used for the purpose of filing and paying the excise tax that is due on wagers. That is ten per cent of the gross wagers for a particular month.

Q. And, when must the 730 be filed?

A. The form must be filed for a particular month by the end of the following month.

Q. So if I accepted $100 worth of wagers in January, by the last day of February I would be required to file a form 730 declaring that $100 and paying the $10 tax?

[fol. 393] A. If you were the principal, that is right, sir.

Q. And is the Form 730 available to the general public?

A. No, it is not.

Q. This is a confidential record?

A. Yes, sir.

Q. Now, if a person is operating a lottery in Allegheny County, Mr. Struble, under the procedures of the Internal Revenue Service would he be required to file his 11-C and his 730 with your office?

A. Yes, sir.

Q. Would you tell us, Mr. Struble, whether the information on the 11-C is used in any way in connection with the computation and collection of the ten per cent excise tax?

A. Well, the 11-C when filed would indicate the beginning period. And, at the time the application is filed, there are questions on the application as to whether the individual is a principal.

If he is a principal, he must answer who his agents are. And, if he is an agent, he must give the name of the principal that he is working for.

And, as a result of the application being properly filed, in addition to the name being put on the stamp, there is another number put on there, a "P" and whatever the next number would be. And, the third copy of the stamp assembly is a mailing slip. So that, the name and this number with a "P" before it would appear on this slip.

And that is the record from which, if it has a "P" on there, that our office would then see that each month he [fol. 394] sent a Form 730, because those that are principals are required to file the Form 730.

So that, that party would automatically receive a Form 730 with his name embossed right on the Form 730 so that it could be used for that particular month.

Q. Now, on the Form 11-C, is the taxpayer also required to give his business address and the names of any partners he might have?

A. Yes, sir.

The Court: May I ask a question. He said something about a principal a moment ago, didn't he?

Mr. Reich: Yes, he did, your Honor.

The Court: Shouldn't that be explained?

Mr. Reich: Yes, I am going to explain it. I am going to have it explained.

The Court: All right.

By Mr. Reich:

Q. Now, you have indicated that if a person indicates on his tax return that he is a principal, his stamp is marked with a "P"?

A. Yes, sir.

Q. Now, is the taxpayer asked on the form 11-C whether he is accepting wagers on his own account or on account of another?

A. Yes, sir. That is part of the application.

Q. And he is required to say whether he is a principal or an agent?

A. That is right.

A. That is right, sir. And the record-10 form behind, when it is manufactured, has the same number in the upper right-hand corner that appears on the stamp, which is the first part.

Q. Now, Mr. Struble, would you explain to the jury now what is a Form 730?

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Q. And, when must the 730 be filed?

A. The form must be filed for a particular month by the end of the following month.

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And, as a result of the application being properly filed, in addition to the name being put on the stamp, there is another number put on there, a "P" and whatever the next number would be. And, the third copy of the stamp assembly is a mailing slip. So that, the name and this number with a "P" before it would appear on this slip.

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The Court: All right.

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A. Yes, sir.

Q. Now, is the taxpayer asked on the form 11-C whether he is accepting wagers on his own account or on account of another?

A. Yes, sir. That is part of the application.

Q. And he is required to say whether he is a principal or an agent?

A. That is right.

Q. And what happens if he indicates that he is an agent?
[fol. 395] A. If he indicates that he is an agent, he is also to indicate who his principal is.

Q. And if he indicates that he is a principal, this "P" goes on his 11-C?

A. It goes on his 11-C, and it also will appear on the stamp so that the third copy of the assembly will indicate that. And that will be instructions to our mailing department to send him a Form 730 which he is required to file.

Q. And so, if he does indicate he is a principal each month he will receive from your office these Forms 730?

A. That is right.

Q. Pertaining to the payment of the excise tax?

A. That is right, sir.

Q. And, these are sent out automatically, I take it?

A. Automatically. By the same token, those that would be an agent wouldn't get the 730.

Q. But they would be required to state the name of the principal?

A. That is right, sir.

Q. At my request, Mr. Struble, did you make a personal investigation to determine if there was on file in your office during the time covered by this indictment—that is April of 1958 through April of 1961—any partnership return indicating the names of Anthony Grosso, Samuel Grosso, Jennie Gatta or Jennie Grosso, or Joseph Pino?

A. Yes, sir.

Q. You made such a search?

A. I made the search.

Q. And will you tell the jury what the results of that search were?

[fol. 396] A. I found no record of a partnership return, Form 1065, having been filed by any one or group of the names mentioned.

Q. Now, if a person is in business as a partnership rather than as an individual, is there a difference in a partnership return as opposed to an individual return?

A. Well the partnership return is a Form 1065 which is an information return, and no tax would be paid on it as such. But, on that return would be indicated the names of the partners and the distribution to each which they are required, which the individuals are required or the partners are required to reflect on their own income tax returns.

COLLOQUY

Mr. Reich: May I ask the indulgence of the Court while I consult with defense counsel, your Honor?

The Court: Yes.

(Interval)

Whereupon, Government's Exhibits No. 12 and No. 13 were marked for identification.

Mr. Reich: Your Honor, may I suggest that I think we can expedite this if we can have a five minute recess?

The Court: Shall we excuse the jury?

Mr. Reich: Yes, sir.

The Court: All right. We will take a recess until counsel is ready.

Please bear in mind the admonition, ladies and gentlemen of the jury, and the alternate jurors, not to talk among [fol. 397] yourselves or with anyone else on any matter connected with this case or to form or express any opinion of the case until it is finally submitted to the jury.

(Short recess.)

The Court: The Court will come to order.

Let the record show the presence of the defendant with counsel.

Are we ready to have the jury brought in now?

Mr. Reich: Yes, we are, your Honor.

The Court: All right.

(The jury was seated and the following proceedings were had in the presence of the jury.)

The Court: Let the record show the presence of the defendant with counsel.

Will counsel stipulate that all the members of the jury and the alternate jurors are present?

Mr. McLaughlin: Yes, your Honor.

Mr. Diamond: Yes, your Honor.

The Court: I just want to remind counsel of the fact of the rule of exclusion. Have you watched that?

Mr. Diamond: Yes, your Honor.

Mr. McLaughlin: Yes, your Honor.

The Court: All right.

[fol. 398] Whereupon, Government's Exhibits Nos. 12 through 41 were marked for identification.

By Mr. Reich:

Q. Mr. Struble, before offering these exhibits, there is one more form I would like you to explain to the jury, and that is the Form 899. Will you tell us what that is?

A. Form 899 is a Treasury Department, Internal Revenue Service form headed, "A Certificate of Assessments and Payments." It is a form that has been devised for the purpose of presenting the record of the District Director's office under certification by the District Directors, signed by him, and placed under his seal.

Mr. Reich: Your Honor, in order to expedite these proceedings, counsel for the Government and for defense counsel have agreed that I may offer each of these exhibits myself and let counsel indicate whether he has any objection to the offer.

At this time, I would like to offer United States Exhibit No. 12, a Form 899 caption, "Certificate of Assessments and Payments," pertaining to taxpayer Anthony Grosso, 840 Ridgeview Drive, Mt. Lebanon, Pittsburgh, Pennsylvania, pertaining to the period of time from July 1, 1957 through June 30, 1961, and this Certificate of Assessments and Payments pertains to the occupational wagering tax. That is the Form 11-C.

I now offer Government's Exhibit No. 12.

Mr. McLaughlin: No objection.

[fol. 399] The Court: It may be admitted, Exhibit No. 12.

Whereupon, Government's Exhibit No. 12 was received in evidence.

Mr. Reich: At this time I would like to also offer Government Exhibit No. 13 pertaining to the same taxpayer, the defendant, Anthony Grosso, pertaining to the payment of the excise tax on wagers; that is the Form 730, between the period of time of April, 1958, through April, 1961.

The Court: April what?

Mr. Reich: April, 1958 through April, 1961.

Mr. McLaughlin: No objection.

The Court: It may be admitted in evidence as Exhibit No. 13.

Whereupon, Government's Exhibit No. 13 was received in evidence.

* * * * * * *

Mr. Reich: Government Exhibit No. 19 is a Form 730 with an accompanying letter over the signature of Joseph A. Pino pertaining to the month of February, 1959. I don't know whether I indicated, this is also a Form 730.

The Court: Form 730.

Mr. McLaughlin: No objection.

The Court: Exhibit No. 19 is admitted.

* * * * * * *

[fol. 400] By Mr. Reich:

Q. Mr. Struble, I show you what has been admitted as Government Exhibit No. 12, and this is the Form 899 pertaining to taxpayer Anthony M. Grosso. Can you tell by looking at Government Exhibit No. 12 whether that defendant had filed a Form 11-C with the Internal Revenue Service during any part of the period from July 1, 1957 through June 30, 1961?

A. The Form 899 indicates that the records of the District Director's office indicate no records for this individual having filed.

The Court: That is Exhibit No. 12.

By Mr. Reich:

Q. And if there was an 11-C on file by this taxpayer, presumably your search would have turned it up?

A. Yes, sir.

Q. And if there is no 11-C on file, does that mean that the taxpayer did not pay the special occupational tax for engaging in the business of wagering during that period of time?

A. That is right.

Q. I ask you to refer to Government Exhibit No. 13 pertaining to taxpayer Anthony M. Grosso. Can you tell us by looking at Government Exhibit No. 13—

The Court: Do you know whether this tax form was filed? You made a statement that if your search didn't find it, it wouldn't be filed. Can you testify one way or another whether it was filed or not?

The Witness: A search was made, and if a return had been filed, the Director's office would have had a record of [fol. 401] it, and the certification here is that no record was found.

The Court: I see.

Mr. Reich: Strike my last question.

By Mr. Reich:

Q. I show you Government Exhibit No. 13 pertaining to the same taxpayer and the payment of the excise tax on the wagers. Did the District Director's office attempt to make a search to find if this taxpayer filed any excise tax returns during the period of time from April, 1958 through April, 1961?

A. A search was made and the Form 899 indicates that no record was found.

Q. And that would indicate that there is no Form 730 on file under the name of Anthony Grosso?

A. Yes, sir.

Mr. Reich: Your Honor, at this time I would like to read to the jury from the various tax returns filed by Samuel Grosso and Joseph Pino.

The Court: You want to read from the exhibits which were admitted into evidence?

Mr. Reich: Yes, your Honor.

The Court: You may do so.

Mr. Reich: Government Exhibits Nos. 14, 15 and 16 are Forms 11-C's which have been admitted as the special tax returns and application for registry—wagering, over the signature of Joseph A. Pino.

[fol. 402] In Government Exhibit No. 14, Joseph Pino in question two was asked to state his address. "Residence, 2816 Voekel Avenue, Pittsburgh 16, Pennsylvania. Business address, none."

In question three the statement is made, "Taxpayer intends to go in business in the near future."

Question four: "If taxpayer is a firm, partnership or corporation, give true name of members or officers.

"Answer: None.

"Number 5. Are you engaged in the business of accepting wagers on your own account?

"Answer: No.

"5-a. Name and address where each such business is conducted.

"Answer: None."

Part b of 5, "Number of employees and/or agents engaged in receiving wagers on your behalf?

"Answer: None.

"c. True name, current address and special tax stamp number of each such person.

"Answer: None.

"6. Do you receive wagers for or on behalf of some other person or persons?

"Answer: No."

Government Exhibit No. 15 pertaining to the fiscal year between July 1, 1958 to June 30, 1959, gives no answer to any of the questions below name and address.

Government Exhibit No. 16, the same tax return pertaining to the period from July 1, 1959 through June 30, 1960, and says in question number 5:

[fol. 403] "Are you engaged in the business of accepting wagers on your own account?

"Answer: Yes.

"Name and address where such business is conducted.

"Anywhere."

Government Exhibits 17 through 22 are the Form 730's which have been admitted in evidence over the signature of Joseph Pino. This pertains to the monthly payment of excise tax by Joseph Pino.

Pertaining to the month of September; 1958, the taxpayer stated that the gross amount of wagers accepted during the month, not including lay-off accepted, "none." That is question one.

Question six, "net tax due. None."

Government Exhibit No. 18 pertaining to the month 9-58 to 2-59 that is crossed out, as you see, "Gross amount of wagers accepted during month not including lay-offs accepted. None.

"Net tax due. None."

Government Exhibit No. 19 over the signature of Joseph A. Pino pertaining to the month of February, 1959, there is no answer to the question of gross amount of wagers accepted during the month not including lay-offs accepted. In answer to question three, "Est. $250,000.

"4. Tax, ten per cent of item three, $25,000.

"6. Net tax due, $25,000."

I would like to read the accompanying letter, which is part of this exhibit, over the signature of Joseph A. Pino.

"Director of Internal Revenue, Pittsburgh 30, Pennsylvania:

[fol. 404] "Regarding Form 730, Joseph A. Pino, 2816 Voekel Avenue, Pittsburgh 16, Pennsylvania, February, 1959, due 3-31-59.

"Gentlemen: Enclosed is Form 730 for February, 1959. On or about February 12, 1959, this operation was started. On February 19, 1959 there was a raid by Lieutenant James at which time all slips and information was seized.

It is estimated that there was done approximately $250,000 worth of business during this period. Enclosed is the ten per cent or $25,000 estimated tax.

"When these slips are made available for totals, a refund may be in order or a balance may be due to the Internal Revenue Service. All operations at the present time have ceased.

"Very truly yours, Joseph A. Pino."

Government Exhibit No. 20 pertains to the month of June, 1959, "Gross amount of wagers accepted during month, none.

"Net tax due, none."

Government Exhibit No. 21 pertaining to the month of July, 1959, "Gross amount of wagers accepted during month, none.

"Net tax due, none."

Government Exhibit No. 22, pertaining to the month of August, 1959, "Gross amount of wagers accepted during month, none.

"Net tax due, none."

Government Exhibits 23 and 24 are the 11-C's filed by Samuel J. Grosso, and these returns are over his signature.

* * * * * * *

[fol. 405] Redirect examination.

By Mr. Reich:

Q. Mr. Struble, how did you answer Mr. McLaughlin's question as to whether or not the practice of the District Director is to keep an alphabetical index of all persons [fol. 406] who pay the excise tax? How did you answer that question?

A. The record that is kept in the Director's office is of the occupational stamp tax for the stamp itself. There is no specific record kept of a Form 730, those that would file a Form 730, or any other of the excise taxes, or of a group of people who had filed income tax returns on a return basis.

Q. And if no such record is kept, no such record can be made available to the general public?

A. That is right, sir.

Mr. Reich: That is all.

* * * * * * *

[fol. 407] ANTHONY M. GROSSO, called as a witness in his own behalf, being first duly sworn, was examined and testified on his oath as follows:

Direct examination.

By Mr. McLaughlin:

* * * * * * *

[fol. 408] A. Well, after you paid for your help and your books, your gumbands, your clips, your attorney fees, your fines and the ones that didn't pay you, you had hardly anything to work with.

Q. Now, I take it that the gumbands and the paper clips weren't a major expense?

A. No.

Q. But the bonds, the attorney fees and that sort of thing, they were?

A. They were, yes.

Q. In the early days of the numbers business, was it customary for the bank—and I assume they called it a bank in those days, did they?

A. Yes, they did.

Q. —to pay for things like fines for the writers and attorney fees if someone would be arrested?

A. Yes.

Q. Now, in those early years, the fines were about really all that you were concerned with, was it not?

A. In the early years, they would pay the fines and costs and attorneys. And very few people went to jail for writing numbers. In those days, they did not do it. It was nothing but a fine.

Q. That was in the early years in the depression?

A. Yes.

Q. Now, after you came back out of the Army and continued in this partnership with your brother Sam, did the volume of your business increase?

A. Yes, it did.

Q. Where did you run the business?

[fol. 409] A. I ran the business up at Elm and Bedford. It was right around the corner from where I lived. It was a little storeroom there.

Q. Was that what you called the headquarters?

A. Well, you could call it a headquarters, but I would be in there and all the writers would come and turn in.

Q. Is that where the money would be counted and the adding machine tapes would be made up?

A. Yes.

Q. Now, when you personally were in the numbers business and working with your brother Sam, did you ever go to the headquarters?

A. Yes, I did.

Q. How often?

A. Every day.

Q. And, what would you do?

A. Oh, I would take care of the business to see that everything went right.

Q. Now, I think you said that the volume increased?

A. Yes, it did.

Q. Over the years?

A. Yes.

Q. Now, in 1950, where did you run your numbers business?

A. In 1950, I was still up at Elm and Bedford. We would gather the business there, and then we would—oh, we would be all over the Hill for our headquarters, and sometimes we would be in my home.

Q. And what happened in 1950?

A. I was arrested in 1950.

Q. Where?

A. At my home.

[fol. 410] Q. Were you indicted?

A. Yes, I was.

Q. And subsequently convicted?

A. I was convicted and sentenced to jail for six months.

Q. In the Allegheny County Workhouse?

A. At the Workhouse.

Q. I believe some other people were arrested with you at your home?

A. My brother, my sister, my brother-in-law, and I think a Mr. and Mrs. Pace, and a girl by the name of Anderson. And I think another fellow by the name of Sam Saber.

Q. As a result of that arrest, was there a trial?

A. Yes.

Q. In the State Court?

A. Yes.

Q. Now, as a result of that arrest, what did you do with respect to the numbers business, if anything?

A. I quit the numbers business.

Q. Why?

A. Well, my daughter was about six years old, going on seven. And after we were arrested in my home, the kids wouldn't want to talk to her. And so, I quit the numbers business, and we moved to another section of Mt. Lebanon, and we built a home there.

Q. What was the condition of your health at that time?

A. I was sick. I had ulcers.

Q. The same stomach disorder that you had had in the Army?

A. Yes.

[fol. 411] Q. Prior to this arrest which led to your conviction in 1950, before that time did persons engaged in the numbers business have to have any federal gambling stamps or pay any federal gambling taxes, or do you know?

A. No, sir. We didn't have to have stamps or anything like that.

Q. Did you ever hear, or have you ever heard, when the gambling stamps came into play, when you had to have them?

A. Yes.

Q. When?

A. Well, when the stamp came out.

Q. When did the stamp come out?

A. I would say in 1950 or 1951.

Q. Now, what did you do with your business in 1950?

A. I quit and I gave it to my brother Sam.

Q. And, to the rest of the family, or did you give it all to him?

A. I gave it to him.

Q. In other words, it became his business?

A. Yes.

Q. Did you keep a piece of it?

A. No, sir.

Q. And I think that trial was around 1952, is that right? 1951 or 1952?

A. I think so. Something like that.

Q. And you then went to the Allegheny County Workhouse?

A. Yes, I did.

Q. And you were there for how long?

A. I was only in the Workhouse for about two weeks when I contracted a bleeding ulcer.

[fol. 412] Q. And from the Workhouse where did you go?

A. They took me to the St. Francis Hospital.

Q. And what happened there?

A. I was operated on, and they took my ulcers out. They took two-thirds of my stomach out.

Q. They removed part of your stomach?

A. Two-thirds, yes.

Q. And then, ultimately after that, you went back and served the remaining portion of the sentence?

A. Well, I stayed about forty days in the St. Francis Hospital, and then from there I went back to the Workhouse, and I was paroled.

Q. And ultimately or later on, you went back to the Workhouse and served out the remainder of the time?

A. Yes, I did.

Q. Now, before you quit the numbers business in 1950, I think you told us that it had grown in volume?

A. Yes, it did.

Q. Did you have any competition at all, or did you have the whole town?

A. Yes, I had competition.

Q. A fair amount of competition?

A. Yes, I did.

Q. During this period prior to 1950 when you and your brother Sam operated the business in a 50-50 partnership, did your name, the name Grosso, become fairly familiar in lottery circles, numbers circles?

A. Yes, sir, it did.

Q. At the same time, were there also other well-known names in the lottery business or numbers business in those years?

A. Yes, there were.

[fol. 413] Q. Why is it that you seem to have the opinion that because the odds were 700 or 800-to-1 that the business wasn't profitable? What difference would the odds make?

A. Well, if you had to pay people at a 700-to-1 and 800-to-1, you had hardly anything to work with.

Q. Why?

A. Well, the percentage, that is all you actually work on. You would have to be awful lucky to win a lot of money. The only other thing we ever done with the business was by the time we would pay our hits and pay the cost of what it would cost us to run this business, we hardly had anything to work on.

Q. You mean the lower the odds, the better it is for the bank?

A. Yes.

Q. It gives you more to work with?

A. Well, the lower the odds, the more money we could make.

Q. In other words, in those years, if someone hit for a dollar, they got $800?

A. Yes, they did.

Q. How many numbers were there in those days?

A. In those days, we had, oh, we had the stock number and we had the race number. I think there were two numbers.

Q. In the early days, when you first started in the business as a kid, how many numbers were there?

A. One number. There was a stock number.

Q. The race number came in later?

A. The race number came in, oh, I would say around 1940, and the only reason why the race number came in was that we didn't trust the stock number. We had so [fol. 414] many hits on the stock number that we tried to go on to another number, so we figured in taking the race number, by it going through the pari-mutuel machines, that no one could steal from it. So we adopted that number.

Q. You say you didn't trust the stock number. What do you mean by that?

A. Well, we couldn't make any money with the stock number. We thought the number was fixed.

Q. Because of the number of hits?

A. Hits, too many hits.

Q. After you had your stomach removed, what did you do as far as working or making a living goes?

A. Well, I was helping my wife run the Horseshoe Bar and I did a little bit of gambling.

Q. Now, in 1956, did you go into any business?

A. Yes. My wife and I built a place called the West Liberty Car Wash at 1804 West Liberty Avenue.

Q. That is up here on the other side of the Tubes?

A. Yes.

Q. What kind of a car wash was it?

A. A very nice car wash.

Q. One of those automatic kind?

A. Yes, those one-minute car washes.

Q. Did you form a corporation to do that?

A. Yes, we did.

Q. Did you hold some position in the corporation?

A. I was the president.

Q. How long did you continue to operate that?

A. Well, I continued to operate that until, oh, about two, two and a half years ago.

Q. Do you still own it?

A. Yes, I do.

[fol. 414a] Q. What do you do with it now?

A. I lease it out.

Q. You rent it to somebody and let them operate it?

A. Yes.

Q. When you started the car wash, where did you get the money to do that?

A. Well, when we opened up the car wash, I had borrowed money from my home and we borrowed money from the Brookline Bank and from my father-in-law.

Q. When you say you borrowed money from your home, you mean you mortgaged your house?

A. I mortgaged my home, right.

Q. And after you got into this car wash business, did either you or your wife get into any other type of business?

A. My wife bought a place out past Mount Lebanon called Bethel Park, a place called the Living Room.

Q. And what is the Living Room?

A. It is a cocktail bar and a restaurant.

Q. Is that owned by your wife individually, or is that owned by a corporation, or what?

A. That is owned by my wife and her brother. It is a corporation.

Q. It is a corporation?

A. Yes.

Q. Aside from the car wash company and the company that owns and operates the Living Room, do you and your wife have any other business interests?

A. Well, we closed up the Horseshoe Bar. We had the lot next door to the West Liberty Avenue Car Wash, and

I have—we have property over on the South Side and we have some property up in the Hill District.

[fol. 415] Q. These properties produce income?

A. Yes.

Q. Now, during the past, oh, five or six years, or say six or seven years, in addition to working around this car wash, I take it you did take some part in the operation of it?

A. Yes, I was the president and I work there.

Q. I mean, did you go there?

A. Yes, I did, every day.

Q. I assume you didn't wash the cars, you—

A. No, I supervised.

Q. —just supervised?

A. Supervised, yes.

Q. In addition to that activity, and aside from your real estate activity, did I understand you to say that you did some gambling?

A. Yes, I did.

Q. What do you mean when you say you did some gambling?

A. Well, I have gambled in Miami Beach, Florida. I have gambled in Atlantic City. I have gambled in New York. I have been at Waterford Park.

Q. And when you say gambling, do you mean playing or booking?

A. Playing.

Q. Is there a difference between bookmaking and gambling?

A. Yes.

Q. What is the difference?

A. Well, a bookmaker takes a bet and a gambler plays it.

[fol. 416] Q. You have gambled, you say, in various cities around the country, Florida and—

A. Well, mostly in Florida.

Q. What type of games do you play? What kind of gambling do you do?

A. Well, I play an awful lot of gin rummy, and sometimes I would shoot crap, and I also bet horses.

Q. And this activity, this gambling activity, does it generate income?

A. Yes.

Q. In other words, you win more than you lose?

A. Yes, I did.

Q. Did you win substantial amounts of money?

A. Yes, I have.

Q. Have you lost substantial amounts of money?

A. Yes, I have.

Q. Now, for instance, these card games that you talked about, are these games for what we call high stakes?

A. Sometimes.

Q. Now, you don't have a gambling stamp, do you?

A. Well, for that kind of gambling, you don't need a stamp.

Q. Do you know whether you have to pay tax on that kind of gambling?

A. Yes, I do.

Q. What kind of tax do you have to pay?

A. No tax.

Q. No excise tax?

A. No.

Q. Do you, however, have to pay income taxes on your winnings?

A. Yes.

[fol. 417] Q. Do you?

A. Yes, I do.

Q. Approximately how much have you reported in your income tax returns over an average of the last four or five, five or six years from gambling income?

A. Oh, around $50,000 a year.

Q. And you have paid tax on that?

A. Yes, I have.

Q. You have paid income tax on it?

A. Yes.

Q. Have you ever had any problems with the income tax authorities or the Internal Revenue Service over your income tax?

A. No, sir.

Q. By the way, I assume you don't make up your own income tax?

A. No, I don't.

Q. It is handled by someone else?

A. Yes.

Q. Is it handled by a CPA?

A. Yes.

Q. Well, if you have been reporting on your income tax around $50,000 a year, which you tell us are approximately your winnings from these gambling activities, I would take it that some of these games are for fairly high stakes?

A. Yes, sir.

Q. And when you say—did you say you occasionally shoot dice?

A. Shoot dice. I play poker.

Q. When you say you shoot dice, do you mean you play craps?

[fol. 418] A. Yes, craps. A game called crap.

Q. Is this a fairly high-staked game?

A. Yes.

Q. Have you won fair amounts on the horses?

A. Yes, I have.

Q. Do you spend some time in Florida?

A. Yes, I do.

Q. When, in the winters?

A. In the winter.

Q. Do you go down during the racing season?

A. I go down in the racing season.

Q. Do you also occasionally follow sporting events?

A. Yes, sir.

Q. Where, here and in other parts of the country?

A. Yes.

Q. By the way, speaking of your income tax returns, do you know whether those returns are audited every year by the Internal Revenue Service?

A. Yes, sir, they are.

Q. In other words, someone goes over them and your accountant tells you they have talked to him about them?

A. Yes.

Q. Have they been accepted every year?

A. Yes, they have.

Q. Without adjustment?

A. I think so.

Q. Now, how do you arrive at figuring out what your winnings are at the end of the year from gambling, from playing cards, shooting crap, going to horse races?

A. Well, I would take so much money with me and I would—this would be almost my net income from the gambling after my living expenses were taken out in [fol. 419] Florida; that is, eating, sleeping, my hotels, and I would take the money and take it home and put it in my drawer and at the end of the year, what I have left, I would file my income tax on.

Q. Or you would tell your accountant and he would file it?

A. Yes.

Q. Now, have you been gambling in a large way since about 19 what, 1955 or 1956?

A. I would say since 1954, 1955, 1956 and on up.

Q. In addition to gambling, playing the horses, shooting crap, and playing poker and gin, you also had an income from your property?

A. Yes, I have.

Q. Approximately how much income do you have from your real estate holdings?

A. Oh, I would say $20,000 a year.

Q. Now, during the years up to 1950 when you—

The Court: What was your question, Mr. McLaughlin?

By Mr. McLaughlin:

Q. During the years up to 1950 when you and your brother Sam operated a lottery business as a partnership, did you take an active part in the operation of the business, or were you sort of a silent partner who never went around?

A. No, I took an active part.

Q. As a matter of fact, in 1950 when you and your brother Sam and some others were arrested, the headquarters was right in your house, wasn't it?

A. Yes, sir.

* * * * * * *

[fol. 420]

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14810

UNITED STATES OF AMERICA, Appellee,

v.

ANTHONY M. GROSSO, Appellant.

Appeal From the Judgment and Order of the United States District Court for the Western District of Pennsylvania.

Argued April 20, 1965

Before McLaughlin, Staley and Smith, Circuit Judges.

OPINION OF THE COURT—Filed March 25, 1966

By SMITH, Circuit Judge.

The appellant was tried by a jury and convicted on twenty counts of an indictment charging violations of the Gam-

[File endorsement omitted]

bling Tax Act of 1954 as amended, 26 U.S.C.A., §§ 4401 and 4411, and related provisions of § 7203 of the same title. On each of said counts he was fined $10,000 and sentenced to a term of imprisonment of one year. He was convicted also on a single count charging conspiracy to defraud the United States, 18 U.S.C.A., § 371, and was thereon fined $1,000 and sentenced to a term of imprisonment of one year. [fol. 421] It was ordered that nine terms of imprisonment were to run consecutively and the others were to run concurrently with the term of imprisonment imposed on count 2. The present appeal is from the judgment entered on this verdict.

The appellant raises several questions, the most important of which is the following: whether, in the absence of both defendant and his counsel, and without notice, the substantial rights of the defendant were abridged by the action of the trial judge when, in response to an unrecorded note from the jury, he transmitted his reply, through the bailiff, without recalling the jury to the courtroom. The question is troublesome because of the wholly inadequate and badly confused record from which it is impossible to accurately reconstruct the incidents giving rise to the situation. We should add that the briefs on the question leave much to be desired.

After a trial which consumed more than four weeks, the instant case was submitted to the jury at approximately 4:15 P.M., on Wednesday, March 4, 1964. Thereafter deliberations continued until 11 P.M., when the jurors retired for the night. The following morning, at approximately 11:30 A.M., shortly after deliberations had been resumed, the jury sent a note to the judge purportedly indicating their inability to reach a verdict. Without notice to the appellant or his counsel, and in their absence, the judge instructed the jury, through the medium of the bailiff, to continue its deliberations. There was no record made of either the contents of the note[1] or the substance of the

[1] The note was lost but it appears from the record that its content was similar to that of a second note, to which reference is made in the body of the opinion.

judge's response. Although informed of the occurrence shortly afterward, counsel for the appellant interposed no objection and failed to request corrective action by the Court.

It was obvious error for the trial judge to instruct the jury, in the absence of the appellant and his counsel, with- [fol. 422] out notice to them. *Shields* v. *United States*, 273 U.S. 583, 588 (1927); *United States* v. *Neal*, 320 F. 2d 533, 536 (3rd Cir. 1963); *Jones* v. *United States*, 308 F. 2d 307, 311 (D.C. Cir. 1962); *Evans* v. *United States*, 284 F. 2d 393, 394 (6th Cir. 1960). It was likewise error to convey these instructions to the jury through the medium of the bailiff. *Henderson* v. *United States*, 204 F. 2d 126 (6th Cir. 1953); *Wheaton* v. *United States*, 133 F. 2d 522, 526 (8th Cir. 1943). These errors do not warrant reversal in the absence of prejudice to the substantial rights of the appellant.

However, if appellant's counsel was of the opinion that the errors were prejudicial it was his obligation to interpose a timely objection and seek corrective action by the Court. *United States* v. *Woodner*, 317 F. 2d 649, 651 (2nd Cir. 1963), cert. den. 375 U.S. 903; *United States* v. *Agueci*, 310 F. 2d 817, 840 (2nd Cir. 1962), cert. den. 372 U.S. 959; *United States* v. *Williams*, 271 F. 2d 434, 437 (7th Cir. 1959), cert. den. 361 U.S. 961. He should have taken this course when he learned of the errors, but failed to do so. A defendant may not sit idly by in the face of obvious error and later take advantage of a situation which by his inaction he has helped to create. *United States* v. *Agueci, supra.*

Although not required to do so, we are empowered to consider the alleged errors on the merits if they affected the "substantial rights" of the appellant. FED. RULES CR. PROC., rule 52(b), 18 U.S.C.A.; *United States* v. *Provenzana*, 334 F. 2d 678, 690 (3rd Cir. 1964), cert. den. 379 U.S. 947; *Ramsey* v. *United States*, 332 F. 2d 875, 877 (8th Cir. 1964); *United States* v. *Vasen*, 222 F. 2d 3, 5, 6 (7th Cir. 1955), cert. den. 350 U.S. 854; *United States* v. *Jones;* 204 F. 2d 745, 749 (7th Cir. 1953), cert. den. 346 U.S. 844. The power is discretionary and should be exercised only in those situa-

tions in which the failure to do so would result in a manifest miscarriage of justice. *Ibid.* We do not have such a situation in the instant case.

[fol. 423] We find upon our review of the record that the evidence as to the appellant's guilt was overwhelming and that therefore there was no reasonable likelihood that the judge's instruction to the jury influenced the verdict. We are of the opinion that under the circumstances reversal on the ground urged is not warranted. *Walker* v. *United States*, 322 F. 2d 434, 436 (D.C. Cir. 1953), cert. den. 375 U.S. 976; *United States* v. *Compagna*, 146 F. 2d 524, 528 (2nd Cir. 1944), cert. den. 324 U.S. 867. The case of *United States* v. *Neal, supra*, upon which the appellant relies, is distinguishable from the case now before us.

Following the above described incident the jury continued deliberations until 10:50 P.M. Shortly thereafter the bailiff in charge reported to the Court that one of the female jurors had been injured and that another had become ill. We are here concerned only with the ill juror. After she was given medical attention the physician reported to the judge by telephone that she was suffering from a nervous disorder, the exact nature of which is not disclosed by the record. This information was imparted to defense counsel, who had been summoned to the judge's chambers by a deputy marshal. The physician's report was apparently never reduced to writing; in any event, its content was not made a part of the record. The juror was again examined by the physician on the following morning. It would appear that the results of this examination were reported to the Court but were likewise not incorporated into the record.

Counsel for the parties met with the trial judge in his chambers on the morning of Friday, March 6, 1964, at which time they were informed that the juror was still ill but that the jury would be able to resume deliberations later in the day. Defense counsel objected to the resumption of deliberations and moved for a mistrial and the discharge of the jury. He argued that because of the illness of the juror,

further deliberations might result "in some sort of a compromise verdict." The motion was denied and jury deliberations were suspended until the following day.

[fol. 424] On the morning of Saturday, March 7, the juror was again examined by the physician, who reported to the deputy marshal that she was still ill. However, the condition of the juror was apparently such that the jury was able to resume deliberations at 2:45 P.M. Shortly thereafter the information which the deputy marshal had received from the physician was transmitted to the trial judge in the presence of counsel. Defense counsel again renewed his motion for a mistrial and the discharge of the jury on the grounds urged earlier. The motion was denied. The trial judge then asked counsel if they would consider stipulating "that [the] case could continue * * * with a jury of eleven." Defense counsel refused to so stipulate.

While counsel for the respective parties were in conference with the judge in chambers, the judge received a second note from the jury reading as follows:

> "I am sorry to inform you that the jury has not been able to reach a verdict. We are deadlocked without any hope, we believe, of any change and feel it useless to deliberate any further. I am not familiar with procedure, but since the majority of the jurors feel that a meeting of the foreman with you might be helpful, I am making such a request."

Again the trial judge failed to recall the jurors to the courtroom. He stated to counsel: "We can't have a meeting with the foreman, but if they want a meeting, they could all come into court, but I don't know what would be accomplished by that. So, I think we will just tell them we got their message and tell them to keep on working." Defense counsel interposed no objection to the proposed action of the trial judge and made no request that the jury be recalled to the courtroom for further instructions. The bailiff was instructed to tell the jurors, "I have got their message and I suggest they keep on working." We assume

that this message was conveyed to the jury, which continued its deliberations for approximately five hours. A verdict [fol. 425] was returned at 8:30 P.M., and thereafter, at the request of defense counsel, the jurors were polled and each assented to the verdict as reported by the foreman.

When the jury returned its verdict the physician who had examined the ill juror was available in the courtroom and this was made known to the Court. Defense counsel requested that the physician be permitted to make his report; this occurred at 9:30 P.M. The Court denied the request stating, "I am not going to bring that up here at this time at all." However, it must be noted that on the previous day the trial judge advised defense counsel that in the event of conviction he could offer the testimony of the physician in support of a motion for a new trial. This motion was made in due course but neither the report of the physician nor his testimony was offered in support of it. It is reasonable to assume that the failure of defense counsel to produce this evidence was prompted by his deliberate choice.

The appellant challenges the verdict as void on the ground that it was the product of judicial coercion. He argues that under the circumstances of this case the prolonged confinement of the jury, coupled with the illness of the juror, constituted duress. We do not agree.

The length of time a jury may be kept together for the purpose of deliberation is a matter within the discretion of the trial judge, and his action in requiring further deliberation after the jury has reported a disagreement does not, without more, constitute coercion. *De Vault* v. *United States*, 338 F. 2d 179, 182 (10th Cir. 1964); *Mills* v. *Tinsley*, 314 F. 2d 311, 313 (10th Cir. 1963), cert. den. 374 U.S. 847; *United States* v. *Minieri*, 303 F. 2d 550, 556 (2nd Cir. 1962), cert. den. 371 U.S. 847, and the cases therein cited. However, it has been held that such action, when accompanied by other circumstances, may be coercive. See *United States* v. *Pleva*, 66 F. 2d 529 (2nd Cir. 1933). The illness of a juror may be regarded as such a circumstance, but

only where it appears from the evidence that the verdict [fol. 426] was induced by the juror's condition. *Id.* There is no such evidence in this case.

Against these critical omissions by the appellant stands the fact that the jury was polled after it returned its verdict. The object of a jury poll is "to give each juror an opportunity, before the verdict is recorded, to declare in open court his assent to the verdict which the foreman has returned and thus to enable the Court and the parties to ascertain with certainty that a unanimous verdict has in fact been reached and that *no juror has been coerced or induced to agree to a verdict to which he has not fully assented.*" *Miranda* v. *United States,* 255 F. 2d 9, 16 (1st Cir. 1958). (Emphasis added). *Humphries* v. *District of Columbia,* 174 U.S. 190, 194. Since each of the jurors assented to the verdict as reported by the foreman, the verdict should not be set aside in the absence of some proof that coercion in fact existed. Contrary to the appellant's contention, the facts of the case do not speak for themselves.

There are several other questions raised on this appeal. These questions relate to: the admission of certain exhibits allegedly procured as a result of illegal searches and seizures; the denial of a motion to dismiss the indictment made prior to trial; the legality of the sentences; and, the constitutionality of § 4401 of Title 26 U.S.C.A. It is necessary that these questions be treated separately.

Admission of Testimony

The exhibits in question were seized in searches conducted at various places at different times. Prior to trial these exhibits were made the subject of a motion to suppress evidence filed by the appellant and three other defendants under rule 41 (e) of Fed. Rules Cr. Proc., 18 U.S.C.A. This motion was denied, *United States* v. *Grosso,* 225 F. Supp. 161. A separate trial was granted the appellant on his motion for a severance filed under rule 14 of Fed. Rules Cr. Proc., 18 U.S.C.A. The arguments of the

[fol. 427] defendant relating to the admissibility of the exhibits will be separately discussed.

A

It appears from the testimony of one Hannan, corroborated by his wife, that he was engaged in the operation of a numbers lottery and, between August of 1957 and April of 1961, was operating under an agreement to "lay off" his daily wagers with the appellant in return for a commission and a share of the profits. The relationship of the defendant to Hannan was that of a "banker." On April 27, 1960, special agents of the Internal Revenue Service, armed with a search warrant, raided the Hannan home, where they seized a notebook containing a daily record of Hannan's business and his transactions with the appellant. This notebook was a significant item of proof in the government's case.

At the trial Hannan was called as a witness and he testified at length as to the nature and extent of his daily business with the appellant. During his testimony the notebook was produced, identified by him as his personal record, and offered in evidence. The appellant interposed no objection to the testimony which preceded the offer but objected to the admission of the notebook on the ground that its seizure was illegal. The arguments advanced in support of the objection were confusing and difficult to follow. The objection was overruled and the exhibit was received.

The appellant here contends that: the search warrant was void; it was unlawfully executed; and, the special agent lacked authority to execute it. We find it unnecessary to consider these contentions, here raised for the first time.

It clearly appears from the undisputed evidence in the record that the premises searched were owned and occupied by Hannan and that the notebook seized was a personal record kept by him in the operation of his illegal business. The person against whom the search was directed was Hannan. There is nothing in the record to show that the

[fol. 428] appellant had the requisite legal interest in either the premises or the notebook and at no time did he claim such an interest. The appellant, relying on *Jones* v. *United States,* 362 U.S. 257 (1960), maintains that he was not required to establish such an interest as a condition precedent to his right to challenge the constitutionality of the search and seizure. This reliance is misplaced and demonstrates the penchant of defense counsel for misreading cases.

The defendant in the *Jones* case was tried and convicted on each of two counts of an indictment charging violations of federal narcotics laws. The first count charged him with having "purchased, sold, dispensed and distributed" narcotics in violation of 26 U.S.C.A. § 4704(a). The second count charged him with having "facilitated the concealment and sale of" narcotics, knowing the same to have been imported illegally, in violation of 21 U.S.C.A., § 174. In a prosecution under either of these statutes the conviction of the accused may rest solely on proof of possession. It is obvious that in such a prosecution an accused may not assert a possessory interest in the property seized without admitting his guilt.

The Court held that under such circumstances a defendant may raise the constitutional question without alleging or establishing, as a condition precedent, the requisite legal interest in the premises searched or the property seized. See *Contreras* v. *United States,* 291 F. 2d 63 (9th Cir. 1961). The Court held further that an accused is a "person aggrieved by an unlawful search and seizure" within the meaning of rule 41(e), *supra,* if his conviction on the criminal charge made against him may be based solely upon proof of possession.

The appellant's interpretation of the *Jones* decision, if adopted, would completely vitiate the requirement of "standing." This was clearly not the intention of the Supreme Court. The Court held, consistently with earlier decisions, at page 261: "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must

[fol. 429] have been a victim of a search or seizure, one against whom the search was directed, *as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.*" (Emphasis supplied). The Court then stated, "Ordinarily, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy."

As we interpret the decision, the Court confirmed the general rule but created an exception applicable only in a limited class of cases, those cases in which an accused has a choice of asserting an interest in the property, thus admitting guilt, or foregoing his right to challenge the constitutionality of the search and seizure. We are of the opinion, and so hold, that the facts in the instant case do not bring it within the exception. See *United States* v. *Konigsberg,* 336 F. 2d 844, 847 (3rd Cir. 1964), cert. den. sub nom. 379 U.S. 930. The appellant herein was tried and convicted of a number of offenses, none of which involved the element of possession.

We have considered the other grounds urged in support of the defendant's claim to standing but find them equally without merit.

B

In the search of the premises of one Lovejoy, located in Bethel Park, Mt. Lebanon Township, local police officials seized "two black books" which apparently contained some evidence as to the operations of a numbers lottery. The circumstances under which the search and seizure were made are set out in detail in the opinion of the District Court, *supra.* On the motion to suppress the evidence it was contended that the search and seizure violated the constitutional rights of the defendants, including those of the ap- [fol. 430] pellant. The contention was dismissed as without merit. The appellant here argues that the decision of

the court below was erroneous. We do not agree. However, we find it unnecessary to consider the constitutional issue because of the circumstances under which the evidence was offered and received at the trial.

Prior to trial the district attorney represented to the Court that the evidence seized in the search of the Lovejoy premises would not be offered. The evidence was not offered in the government's direct case. The appellant took the stand in his own defense and, under examination by his counsel, not only denied his complicity in the offenses with which he was charged but also testified affirmatively that he had in no way been connected with the operations of a numbers lottery since late in 1950. He further testified that since that time he had been engaged in nothing but legitimate business enterprises.

In rebuttal the government introduced the testimony of a local police official who identified the books as having been seized in the search of the Lovejoy premises. He testified as to efforts made by the appellant to obtain possession of the books by bribery. The evidence, including the books, was offered for the limited purpose of refuting the appellant's sweeping claim that he had not been engaged in the numbers lottery since 1950. The jury was carefully and properly so instructed.

The appellant argues here, as he did in the court below, that receipt of the evidence was precluded by the government's pretrial representation that it would not be used. We cannot agreed. Any advantage that the appellant could have derived from the representation was waived when he testified, under direct examination by his own counsel, that he had not been engaged in the numbers lottery since late in 1950. Under the circumstances the government was not required to stand idly by and let the testimony go unchallenged. The case of *Walder* v. *United States*, 347 U.S. 62 (1954), although factually distinguishable, clearly supports this result.

[fol. 431] In the *Walder* case it was stated at page 65:

> "It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. . . .
>
> "Take the present situation. Of his own accord, the defendant went beyond a mere denial of complicity in the crimes of which he was charged and made the *sweeping claim that he had never dealt in or possessed any narcotics.* Of course, the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. He must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief. Beyond that, however, there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility." (Emphasis supplied).

C

A search of the premises of one Betts, located in Jefferson Borough, resulted in the seizure of certain evidence, the nature of which is not disclosed. The appellant concedes that this evidence was neither offered nor received at the trial but contends only that it was improperly used in the computation of his tax liability for certain periods covered by the respective counts of the indictment. We find nothing in the record to support the contention that the evidence was so used; in fact, the undisputed testimony is clearly to the contrary. Therefore we find it unnecessary to consider the appellant's attack on the constitutionality of the search.

[fol. 432] D

During an investigation of gambling in the area of Pittsburgh, local police officials obtained information that the Calvary Cemetery was being used as a "numbers drop," an exchange point at which lottery wagers were delivered surreptitiously to the representatives of the "bank." On November 27, 1959, while the cemetery was under surveillance, the police observed one Petraglia arrive on the scene in a blue Chevrolet. Shortly thereafter other vehicles arrived and their occupants[2] were observed depositing envelopes and brown paper bags in the Petraglia car. The police knew from experience and their earlier investigation that this was a customary method of delivery employed by numbers operators. They moved in, arrested Petraglia, immediately searched his car and found the envelopes and bags containing thousands of lottery slips. The arrest and search were made without a warrant.

It clearly appears from the undisputed evidence, which we find unnecessary to summarize, that the police had reasonable grounds and probable cause to believe that Petraglia and others they observed on the scene were engaged in the operation of a lottery in violation of Pennsylvania law. This seems to be conceded by the defendant. However, he argues that the absence of a warrant rendered unlawful the arrest and the search which followed. We cannot agree. The urgency of the situation which confronted the police was sufficient to excuse their failure to obtain a warrant. *Draper* v. *United States,* 358 U.S. 307 (1959); *United States* v. *Rabinowitz,* 339 U.S. 56 (1950). Petraglia was in a moving vehicle apparently ready to flee as the police approached; in fact, his flight and that of one Berkowitz, who was in another car, was prevented when the police blocked the roadway with their vehicles. The case of *McDonald* v. *United States,* 335 U.S. 451 (1948), on

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[2] As a result of earlier investigations these persons were known to the police as "runners" or numbers operators.

which the defendant relies, is distinguishable on its facts and therefore inapposite.

[fol. 433] Assuming the illegality of the search, we find the appellant lacked the standing to challenge it. *Jones* v. *United States, supra; United States* v. *Konigsberg, supra.* In his pretrial motion to suppress the evidence he neither alleged nor established the requisite interest in either the automobile searched or the property seized. At the trial of the action the appellant was in no better position to object to the admission of the evidence.

Denial of Motion to Dismiss Indictment

Pursuant to rule 12(b)(2) of the Fed. Rules Cr. Proc., 18 U.S.C.A., the appellant moved for dismissal of the indictment on the ground that it was predicated at least in part on illegally seized evidence. The denial of this motion is urged as a ground for reversal. It is well established that an indictment is not open to challenge on the ground that the evidence presented to the grand jury was either inadequate or incompetent. *Lawn* v. *United States,* 355 U.S. 339, 349, 350 (1958); *Costello* v. *United States,* 350 U.S. 359, 363, 364 (1956); *United States* v. *Labate,* 270 F. 2d 122 (3rd Cir. 1959), cert. den. 361 U.S. 900; *Coppedge* v. *United States,* 311 F. 2d 128, 132 (D.C. Cir. 1962), reversed on other grounds 369 U.S. 438; *United States* v. *Aviles,* 274 F. 2d 179, 191 (2nd Cir. 1960).

Alleged Illegality of Sentences

The appellant contends that the trial judge erred in imposing a separate sentence on each of fifteen counts charging him with the failure to pay the excise taxes due for specified monthly periods. This contention was held by this Court to be without merit in the case of *United States* v. *Minker,* 312 F. 2d 632, 636 (1962), cert. den. 372 U.S. 953, which is not mentioned in either brief.

Constitutionality of Statute

The appellant challenges the constitutionality of § 4401 of Title 26 U.S.C.A., under which a tax is imposed on [fol. 434] wagers as defined in § 4421 of the same title. He argues that the requirement that he file a tax return stating the gross amount of the wagers received violates his constitutional privilege against self-incrimination. This argument is predicated on an alleged possibility of exposure to prosecution under local law. We have found no regulation under which such returns may be made available to local police and there is no evidence in the record that they are. The only public record available for inspection is an alphabetical list of the names of all persons who have paid special taxes under the Gambling Tax Act, *supra.* 26 U.S.C.A. § 6107.

A constitutional issue similar to that raised here was considered and decided by the Supreme Court in *Lewis* v. *United States,* 348 U.S. 419, 422 (1955). The issue was disposed of on the following basis:

> "If petitioner desires to engage in an unlawful business, he does so only on his own volition. The fact that he may elect to pay the tax and make the prescribed disclosures required by the Act is a matter of his choice. There is nothing compulsory about it, and, consequently, there is nothing violative of the Fifth Amendment. If he does not pay the occupational tax, proceeds to accept wagers, and is prosecuted therefor, as in this case, he cannot be compelled to testify and may claim his privilege. The only compulsion under the Act is that requiring the decision which would-be gamblers must make at the threshold. They may have to give up gambling, but there is no constitutional right to gamble. If they elect to wager, though it be unlawful, they must pay the tax."

This rationale is applicable here. See *United States* v. *Costello,* 352 F. 2d 848, 851 (2nd Cir. 1965).

The imposition of a tax on wagers was a valid exercise of the federal taxing power. *United States* v. *Kahriger,* 345 U.S. 22, 31, 32 (1953); see also *Lewis* v. *United States,* [fol. 435] *supra.* When the appellant voluntarily elected to engage in the business of accepting wagers he was required to pay the occupational tax imposed by § 4411 and the excise taxes imposed by § 4401. The requirement that he file a return was intimately related to the collection of the latter taxes and is therefore supportable as a proper enforcement measure. Under the rationale of the *Lewis* case, the possibility "of incrimination for future or even past acts, however great, is irrelevant . . ." *United States* v. *Costello, supra.*

If, as the appellant now contends, the form of return would call for the disclosure of potentially incriminatory information, the objection should have been raised in the return. See *United States* v. *Sullivan,* 274 U.S. 259, 263 (1927). The appellant may not refuse to pay the excise taxes lawfully due and then claim immunity from prosecution for this refusal on the ground that the requirement of a return per se violates his privilege. *Id.* at 264. Since he failed to file the returns "it is difficult to see how he can now claim the privilege even assuming that the disclosure of violations of law is called for." *United States* v. *Kahriger, supra; Lewis* v. *United States, supra,* at 33.

An argument similar to the one made here was advanced in *United States* v. *Joseph,* 278 F. 2d 504 (3rd Cir. 1960), cert. den. 364 U.S. 823, and was therein held to be without merit.

The judgment of the court below will be affirmed.

[fol. 436]

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14,810

UNITED STATES OF AMERICA

vs.

ANTHONY M. GROSSO, SAMUEL J. GROSSO, JENNIE B. GROSSO, JOSEPH PINO

ANTHONY M. GROSSO, Appellant

(D.C. Criminal No. 62-281)

On Appeal From the United States District Court for the Western District of Pennsylvania

Present: McLaughlin, Staley and Smith, *Circuit Judges.*

JUDGMENT—March 25, 1966

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed March 10, 1964, be, and the same is hereby affirmed.

March 25, 1966

[File endorsement omitted]

[fol. 437] Petition for Rehearing en banc covering 22 pages filed April 9, 1966 omitted from this print.

It was denied, and nothing more by order. May 3, 1966

[fol. 438]

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14,810

UNITED STATES OF AMERICA, Appellee,

v.

ANTHONY M. GROSSO, Appellant.

ORDER DENYING PETITION FOR REHEARING IN BANC—
May 3, 1966

Present: Staley, Chief Judge, McLaughlin, Kalodner, Hastie, Ganey, Smith and Freedman,* Circuit Judges.

The petition for rehearing filed by Anthony M. Grosso in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

William F. Smith, Judge.

Dated: May 3, 1966

[File endorsement omitted]

[fol. 439] Clerk's Certificate to foregoing transcript (omitted in printing).

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* Judge Freedman would grant rehearing.

[fol. 440]

SUPREME COURT OF THE UNITED STATES

No. 181—October Term, 1966

ANTHONY M. GROSSO, Petitioner,

v.

UNITED STATES

ORDER ALLOWING CERTIORARI—October 10, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. The case is placed on the summary calendar and set for oral argument immediately following No. 41.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.